No. 131.

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No. 2

134

STATEMENT AND BRIEF ON BEHALF OF APPELLEE.

—IN THE—

Supreme Court of the United States.

FELIX M. HANLEY, JEREMIAH G. WALLACE, HENRY W. WELLS, Commissioners and Members of the Railroad Commission of the State of Arkansas, *Appellants*,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Appellee*.

No. 368.

Statement, Brief and Argument of Appellee.

STATEMENT.

The Kansas City Southern Railway Company, as disclosed by the Bill of Complaint, is a railway corporation organized and existing under and by virtue of the laws of the State of Missouri, and owns or controls, maintains and operates a line of railroad extending from Kansas City, Missouri, to Ogden, on the dividing line between the States of Texas and Arkansas (pp. 1 and 2 Transcript). Between Kansas City and Ogden the road traverses the States of Missouri, Kansas, Arkansas and Indian Terrtitory (p. 2 of Transcript).

Said railroad after reaching the northern line of the State of Arkansas runs through the counties of Benton

and Washington therein, a distance of 28.65 miles, to the dividing line between Arkansas and the Indian Territory; thence 127.78 miles through the Indian Territory to another point on the dividing line between the State of Arkansas and the Indian Territory, where the Indian Territory adjoins the county of Polk in the State of Arkansas. It also has a branch running from Spiro in the Indian Territory to Ft. Smith in the State of Arkansas, of which branch fifteen miles is within the Indian Territory and one mile within the State of Arkansas. After passing through the Indian Territory said railroad extends through Arkansas a distance of 117.618 miles to the Red River, where said railroad connects with the Texarkana & Ft. Smith Railway, and by connections as set forth in the bill of complaint, a continuous route is provided to Port Arthur in the State of Texas (p. 2 of Transcript).

The line of railroad through the Indian Territory was built under the authority granted to The Kansas City, Pittsburg & Gulf Railroad Company by an Act of Congress approved February 27, 1893, and was formerly the property of the Kansas City, Pittsburg & Gulf Railroad Company. This ownership included that portion of the line of railroad in the Indian Territory and Arkansas as aforesaid (p. 6 Transcript). By a public sale (through foreclosure proceedings) the property has been acquired by complainant, The Kansas City Southern Railway Company (pp. 5 and 6 Transcript). On the said line of railroad located in the Indian Territory there are various stations and depots to the number of thirty and on said line of railroad in said Indian Territory there are four junction points where passengers and freight are exchanged and transferred from

other lines of railroad to that of The Kansas City Southern Railway Company (pp. 3 and 4 Transcript).

On the 29th day of May, A. D. 1900, the Fort Smith Chair Company made a shipment of chairs from Fort Smith, Arkansas, to Grannis, Arkansas, over the railroad of the Kansas City Southern Railway Company, said shipment going via Spiro, Indian Territory, the distance it transversed being 52.155 miles in Arkansas and 63.841 miles in the Indian Territory, for which The Kansas City Southern Railway Company received $5.26 as freight charges (pp. 2 and 11 Transcript). The said Fort Smith Chair Company filed a complaint before the railroad commission of Arkansas, stating that an overcharge had been made by The Kansas City Southern Railway Company on said shipment to the amount of $1.81 (p. 25 Transcript). On the 14th day of August, A. D. 1900, said railroad commission rendered upon said complaint an opinion in favor of said Fort Smith Chair Company, and therein decided that said shipment was a domestic shipment of the State of Arkansas; that it was not an interstate shipment or of that nature; that the said commission had jurisdiction over the rate therefor and that said The Kansas City Southern Railway Company had been guilty of overcharging the said Fort Smith Chair Company to the amount of $1.81. The Commission further held that the said Railway Company was liable to prosecution for the statutory penalty for such overcharge. The Commission further held in effect, that it had jurisdiction over and the right to fix rates for all shipments from point to point in the State of Arkansas, where, in the course of transportation, the shipment passes through the Indian Territory (pp. 24 to 27 Transcript). A

petition for rehearing was filed by said Railway Company before said Commission.

On the 3d day of October, A. D. 1900, said Railroad Commission overruled said petition for rehearing and ordered said Railway Company to comply with and maintain the rates established by said Railroad Commission from points in Arkansas to other points in Arkansas, when a shipment passes through a portion of the Indian Territory or any other state than the State of Arkansas (pp. 27 and 28 Transcript). On the 3d day of October, A. D. 1900, The Kansas City Southern Railway Company filed its bill of complaint herein to enjoin the said Railroad Commission and the members thereof from enforcing said order (p. 1 Transcript), and on the 5th day of October, 1900, a temporary injunction was issued against the defendants from enforcing said order and from interfering with or undertaking to regulate the rates to be charged for shipments of the kind aforesaid (p. 28 and 29 Transcript).

The facts set forth and alleged in the bill of complaint were admitted by the defendants. A general demurrer to the bill was filed. (p. 32 Transcript). Thereafter the case was argued and submitted upon the bill and demurrer. The demurrer was overruled and a decree rendered upon the bill in favor of the complainant Railway Company and a perpetual injunction was granted against the defendants which appears in full in the printed record (pp. 44 and 45 Transcript). Defendants have brought the case to this Court by appeal.

The question involved is one of law. If the shipment in question constituted commerce *exclusively under the jurisdiction of Congress*, then the decree of the trial Court should be affirmed.

BRIEF AND ARGUMENT.

I.

Question Presented.

Upon the facts set forth in the bill the question presented is whether the shipment in question constituted *domestic commerce of the State of Arkansas or whether it was commerce wholly and exclusively under the jurisdiction of the Congress of the United States,* and conventionally termed inter-state commerce.

If it were domestic commerce of the State of Arkansas, then that State, through its officials, duly authorized, had jurisdiction over it and control of it. If on the other hand it were commerce exclusively under the jurisdiction of Congress, it was beyond the reach of any law, commission or power of the State, and the State could not regulate the rates governing it. The contention of the Railway Company is that it was commerce *under the exclusive jurisdiction of Congress;* that the State of Arkansas could not control it or make rates to govern it; that the attempt of the Arkansas commission to do so was the exercise of an unlawful and unwarranted power; that an injunction was properly granted to restrain the attempt of the Arkansas commission to regulate or control the rates for such commerce and that the demurrer to the bill was properly overruled.

II.

Distinctions Between Different Kinds of Commerce.

In the argument in the trial Court frequent use was made of the expressions, "Commerce," "Inter-State Commerce" and "Intra-State Commerce." We will, however,

use in preference and as better illustrating the distinctions to be borne in mind, the expressions, *"Domestic Commerce" of the States* and *"Commerce under the exclusive jurisdiction of the Congress of the United States."* When commerce falls under the definition of "domestic" commerce the States have jurisdiction, and when it does not fall under that definition the States have no jurisdiction—whether the commerce should properly be styled *Inter-state* Commerce or commerce under the exclusive jurisdiction of Congress. Our contention is that all commerce which is not domestic *within each State* is commerce under the jurisdiction of Congress, whether the appellation of "inter-state" can with strict propriety of language be applied or not, and that in order to prevent the exercise of State jurisdiction over the same, it is sufficient to demonstrate that the commerce is *not domestic*. It is indisputable that the power to regulate commerce rests either in the States or in the Congress of the United States. No State, however, can make a law having any force beyond the boundaries of that State, and consequently no State can make a law and command obedience thereto *on any soil other than its own*.

A course of conduct happening elsewhere than within the State of Arakansas, even though it be expressly contrary to the provisions and policy of the laws of Arkansas, cannot be punished, regulated, controlled, or governed by the State of Arkansas. For this reason the State of Arkansas can have no jurisdiction over a rate charged for transportation *performed upon the soil of the Indian Territory*. Nor can any other State have such jurisdiction. *Consequently, the jurisdiction must rest in the only other depository of power to regulate at all*. In either such event, however, Arkansas is entirely without jurisdiction or power.

These are the considerations which impel us to contend that it is sufficient to show that the commerce in question is not domestic commerce, whether it is to be termed in the strict sense of the term *inter-state* commerce or not. It may be a little awkward to term the commerce in question *inter-state*, because it moves from a State into a Territory, and not into another State, but whether it is strictly appropriate or not to call it *inter-state* commerce, all the principles and reasons which serve to distinguish inter-state from domestic or intra-state commerce likewise serve to distinguish the commerce in question from the domestic commerce of the State of Arkansas, because inter-state commerce—*an expression not found in the Federal Constitution—is only a name of convenience by which to designate a commerce which moves over the soil of different jurisdictions, and over which neither of such individual jurisdictions has any power or control.*

To all intents and purposes the commerce in question is inter-state commerce or of that nature, and will be so dealt with. The above suggestions, however, will serve to show the applicability of the navigation cases hereinafter cited, and which, upon argument in the trial Court, were contended by counsel for the commission to have no application *because* they were not strictly inter-state commerce cases.

The fact that commerce moving over or across different jurisdictions ceases to be commerce of the jurisdiction in which the voyage began, so soon as it passes beyond the boundaries of that jurisdiction, even though destined to another point therein, is the underlying principle of the navigation cases, and hence it must be manifest that the doctrine is applicable to the case at bar, which

differs only in the fact that the Indian Territory is composed of land instead of being a portion of the high seas. *The Territory, however, is equally with the high seas beyond the jurisdiction of any State of the Union, and is under the exclusive jurisdiction of Congress.*

III.

History of Commerce Clause.

The provision of the Constitution in question is as follows:

"The Congress shall have power * * * to regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes."

Of this provision it has been well said by Mr. Prentice in his most admirable work entitled: "Commerce Clause of the Federal Constitution," page one: *"This is all save what may be found by implication."*

Commerce Clause of the Federal Constitution, (by Prentice & Eagan), page 1.

A review of the cases arising under this clause readily shows the great importance and wisdom of the provision. The element of discord among the States under the Articles of Confederation, growing out of the attempts of individual States to impose burdens for their own separate benefit upon inter-state commerce, was the most urgent cause giving rise to the calling of the Constitutional Convention. Mr. Madison, in paper number 42 of the Federalist, spoke upon this matter as follows: as follows:

"The defect of power in the existing confederacy, *to regulate the commerce between its several members,* is in the number of those which have been clearly pointed out

by experience. To the proofs and remarks which former papers have brought into view on this subject, it may be added, that without this supplemental provision, the great and essential power of regulating foreign commerce, would have been incomplete and ineffectual. *A very material object of this power was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter.* Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found out to load the article of import and export, *during the passage through their jurisdiction,* with duties which would fall on the makers of the latter, and the consumers of the former. We may be assured, by past experience, that such a practice would be introduced by future contrivances; and both by that and a common knowledge of human affairs, that it would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquility. To those who do not view the question through the medium of passion or of interest, the desire of the commercial States to collect, in any form, an indirect revenue from their uncommercial neighbors, must appear not less impolitic than it is unfair; since it would stimulate the injured party, by resentment as well as interest, to resort to less convenient channels for their foreign trade. But the mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned before public bodies as well as individuals, by the clamors of an impatient avidity for immediate and immoderate gain.

The necessity of a superintending authority over the reciprocal trade of confederated States, has been illustrated by other examples as well as our own. In Switzerland, where the union is so very slight each canton is obliged to allow to merchandise a passage through its jurisdiction into other cantons, without an augmentation of the tolls. In Germany, it is a law of the empire that the princes and States shall not lay tolls or customs on

bridges, rivers, or passages, without the consent of the emperor and diet; though it appears from the quotation in an antecedent paper, that the practice in this, as in many other instances in that confederacy, has not followed the law, and has produced there the mischiefs which have been forseen here. Among the restraints imposed by the union of the Netherlands on its members, one is, that they shall not establish imposts advantageous to their neighbors, without the general permission.

The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case in which the articles of confederation have inconsiderately endeavored to accomplish impossibilities; *to reconcile a partial sovereignty in the union, with complete sovereignty in the States; to subvert a mathematical axiom, by taking away a part and letting the whole remain.*"

See Federalist Number 195 to 197, Edition of 1842.

The original call of the Virginia House of Delegates in 1784, for a meeting of deputies from all the States, recited as the only proposed duty of such delegates, the following:

"To take into consideration the trade of the United

States; *to examine the relative situations and trade of the said States;* to consider how for a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several States such an act, relative to this great object, as when unanimously ratified by them, *will enable the United States* in Congress, effectually to provide for the same."

See Journal of Constitutional Convention, by Madison, Vol. 1, p. 36 (Scott Ed.).

Under this call, commissioners from only five States assembled, but public sentiment had so developed and been so stimulated, as Mr. Madison says, by the effect of the contemplated object of the meeting, that these delegates recommended to the States a Convention *with powers adequate to the occasion.* In recommending such convention, they said: "Deeply impressed, however, with the magnitude and importance of the object confided to them on this occasion, your commissions cannot forbear to indulge an expression of their earnest and unanimous wish, that speedy measures may be taken to effect a general meeting of the States in a future convention, *for the same* and such other purpose as the situation of public affairs may be found to require. * * * In this persuasion, your commissioners submit an opinion that the idea of extending the powers of their deputies to other objects than those of commerce, which had been adopted by the State of New Jersey, was an improvement on the original plan, and will deserve to be incorporated into that of a future convention. They are the *more naturally led to this conclusion,* as in the course of their relations on the subject, they have been induced to think that *the power of regulating trade is of such comprehensive ex-*

tent, and will enter so far into the general system of the Federal Government, that to give it efficacy and to obviate questions and doubts, concerning its precise nature and limits, may require a corresponding adjustment of other parts of the Federal System."

Journal of the Constitutional Convention, Vol. 1, p. 39.

Mr. Madison says, in speaking of the defects in the Articles of Confederation:

"The same want of a general power over commerce led to an exercise of the power, separately, by the States which not only proved abortive, but engendered rival, conflicting and angry relations."

Journal of Constitutional Convention, p. 46.

And further says, in closing a review of the weaknesses of the Articles of Confederation:

"Such were the defects, the deformities, the diseases and the ominous prospects, *for which* the convention *were to provide a remedy and which ought never to be overlooked* in expounding and appreciating the constitutional charter, *the remedy that was provided."*

Journal of the Constitutional Convention, Introduction, p. 48.

The importance and prominence of this same subject was not wanting upon the opening of the Convention. Mr. Randolph, in the first address made therein, and speaking of the character of the government to be formed, said:

"The character of such government ought to secure, first, against foreign invasion; *secondly, against dissentions between members of the Union."*

Journal of the Convention, Vol. 1, p. 60.

In enumerating the deficiencies of power under the confederacy, he said, among other things, that:

"The Federal Government could not defend itself against *encroachment from the States.*"

Journal of the Convention, Vol. 1, p. 66.

The importance in the minds of the commissioners of the power *to regulate commerce,* again *appears in the first draft of the proposed constitution submitted to the convention by Mr. Pinckney,* in which there was provided to be given to Congress the power to "regulate commerce with all nations *and among the several States.*"

Journal of the Convention, Vol. 1, p. 66.

The subject might profitably be pursued through the entire record of the convention. It seems to have been a subject which commanded a common obedience, and its consideration seems to have been for the purpose of putting beyond cavil, *an exclusive superintending control in the Congress of the United States of that particular class of commerce, viz: Inter-state Commerce, previous attempts to deal with which by individual States had given the chief cause of complaint which inspired the calling of the convention.*

With so much of history to guide, it would seem that there ought to be no hesitation in denying to a State the power to regulate *that commerce which crosses the boundaries of the State and in pursuing its destination traverses the soil of a separate jurisdiction and over which the first State has no authority whatever.* Originally, there was no such hesitation, as evidenced by the decision of the first case in which the commerce clause of the constitution was presented for consideration, viz: The case of *Gibbons against Ogden.* This clause of the constitu-

tion has, however, held equally as conspicuous a place in the deliberations of the judicial tribunals of the country as it held in the Constitutional Convention, and among the causes giving rise thereto.

IV.

Multiplicity of Decisions.

It would be impossible in this brief, without extending it far beyond reasonable bounds, to review the judicial evolutions through which this clause has passed in the matter of interpretation.

Mr. Prentice, in his work above quoted, points out that the construction of this clause was before the Supreme Court of the United States only five times prior to 1840. In 1860, the number of cases had increased to twenty. In 1870, the number was thirty. In 1880, the number was seventy-seven. In 1890, one hundred and forty-eight; while at the present time, the number is considerably upwards of two hundred. In the United States Circuit, District and State Courts, the number of cases involving construction of this clause, reaches almost fourteen hundred.

Commerce Clause of the Federal Constitution (By Prentice & Egan), p. 14.

In this list of cases are to be found many different shades of opinions. Sometimes are found contradictory opinions. There are many dissenting opinions. Some opinions were scarcely delivered before modified or overruled. However, the final outcome of this multitude of cases and variety of opinions seems to be a well defined rule that in the regulation of commerce not domestic (that is commerce not confined within the bounds of a single

State), the Congress of the United States is vested with the *exclusive power*. This is the doctrine of the *earliest and the latest cases.*

V.

Apparent difficulty of the case at bar.

The seeming difficulty in the present case will be found, upon careful consideration, to have no real existence. It arises from the fact that the shipments of freight are from a beginning point to an ending point both in the same State. This, it is contended, makes the commerce domestic and under control of the State within which both points are situated, *notwithstanding the fact that in its journey the freight passes out from that State and into and through another jurisdiction during the greater part of the distance of transportation.* It is contended that inasmuch as the shipment is from a citizen at one point in Arkansas to another citizen at another point in Arkansas, that it is commerce between citizens of the same State, and hence domestic in its nature. It should be observed, however, that the language of the constitution deals *only* with a matter *among States;* while the transactions from which Inter-state Commerce usually follows as a conclusion are dealings between citizens of different States, *the recorded history of the Constitutional Convention shows that the commerce clause of the Federal Constitution did not have its origin in any design to protect dealings between such citizens, but in the manifest necessity of preventing the exercise on the part of the States of State authority over commerce that was not domestic, that is, wholly within the State.*

It was the matter of State power and the evils of the exercise thereof that the convention considered. *It*

was not primarily individual interests which were deliberated upon, but the effect upon the commercial development of the country if commerce, in crossing State lines, could at every boundary be burdened by taxation which each of the States might impose, by assertion of that sovereignty which they had not yielded under the Articles of Confederation. The adoption of the clause was a concession of the rights of States, and not of individual rights. It was the exercise of the sovereign rights of individual States which created the evils sought to be remedied. The exercise of the rights of individuals or citizens of individual States could never have created the evils. The power whose exercise annoyed was a power inherent in the political organism of the State as such and not in its individual citizens. Oppression and retarding of commerce by State power was the evil to be cured, and the conclusion was the deprivation of the power of the States to the extent necessary to make commerce, which crossed State lines, absolutely free from State interference. It will not do, therefore, in the light of history, to determine whether commerce is domestic or inter-state by the criterion of dealings between citizens of the same State or between citizens of different States. *The test should be whether it is that commerce which, before the adoption of the Federal Constitution and under the Articles of Confederation, could have been interfered with by taxation or imposition of duties by each individual State into whose territory it entered or over whose soil it crossed.* If it be that class of commerce, then it is that commerce which the Federal Constitution has put beyond the reach of the individual State and over which it deprived the individual State of the power of control.

It need, therefore, only be inquired whether the com-

merce is of that kind upon which the different States might, under the Articles of Confederation, have imposed burdens in order to be permitted to enter or cross their respective territories. If it be, then it is the kind of commerce sought to be and intended to be guarded from State interference by the clause of the constitution in question.

VI.

"Indian Territory" Compared with "States."

If the Indian Territory were a State it could not regulate rates for the passage of the traffic in question across its soil. If it could, its regulation would be confined to that part of the transportation within its boundaries. So the State of Arkansas would, in its regulation, be confined to that part of the same traffic within its boundaries. *Each State would then be independently regulating a portion of the same traffic.* This would be an illustration of the very evil sought to be cured by the commerce clause of the Federal Constitution. Can it make any difference, because the Territory is not a State? Certainly not. The principle is the same, whether it be a State or Territory. The Territory is a jurisdiction separate and distinct from that of Arkansas, and the State of Arkansas has no more right to invade that jurisdiction, because it is under the Federal Government, than it would have to invade it if it were under the jurisdiction of a State of the Union equally independent as the State of Arkansas.

The word, "State," is only a conventional term to designate a defined political organism. *The intention of the framers of the Constitution was to prevent the exercise of the power of different jurisdictions over the same commerce, or different portions thereof. They aimed to*

prevent transportation from being divided into parts by the lines of different jurisdictions and interference with such divided portions by the different jurisdictions whose boundary lines had marked such division.

VII.

Definitions.

Having in mind the evils existing under the Articles of Confederation, in regard to commerce which traversed different jurisdictions, and aiming to prevent them, the Constitutional Convention provided that the Congress of the United States should have the power to regulate commerce "among the several States."

The word "regulate" means "to [illegible]ist by rule." It is synonymous with "rule," "manage," "govern."

> See Century Dictionary and 'Cyclopedia, word "regulate."

"Commerce," says Chief Justice Marshall, in *Gibbons* v. *Ogden* (9 Wheat.), undoubtedly is *traffic, but* it is something more, it is *intercourse.*

"Among" is defined to mean "*in or into the midst of. In association or connection with.*"

> See Century Dictionary and 'Cyclopedia, word "among."

Paraphrased into the language of these definitions the clause in question would read that Congress shall have power to rule or govern that traffic and intercourse which moves in or into the midst of or is associated or connected with several States.

The transportation in question certainly moves into the midst of the Indian Territory. In conducting it, intercourse is necessarily had with the Territory and its peo-

ple; the traffic and intercourse is necessarily associated and connected with the Indian Territory. So quickly as the shipment crosses the line of the Territory it begins to move upon the soil of the Territory. It then moves freely among the people of that Territory in the absence of Federal regulations. It is subject to local laws of inspection, if any exist there; to quarantine laws, if any exist there, so far as they are intended purely to prevent the spread of contagious disease. It is subject to the police power of the local jurisdiction which it enters. It is subject to charges to defray expense of inspection and of quarantine regulations of the local jurisdiction. On this point we refer to the work of Mr. Prentice where a compilation of the authorities will be found.

See Commerce Clause of the Federal Constitution (By Prentice & Egan, Chap. V, pp. 146 to 150).

In the case of *Hannibal & St. Joseph R. R. Co.* v. *Husen*, the Court held a statute of the State of Missouri invalid which provided that between the first day of March and the first day of November of each year, no Texas, Mexican or Indian cattle should be brought into the State. The ruling was because the statute was a prohibition between those dates of all inter-state commerce on cattle of the description mentioned, regardless of their actual condition. The Court used the following language:

"While we unhesitatingly admit that a State may pass sanitary laws and laws for the protection of life, liberty, health or property *within its borders*, while it may prevent persons and animals suffering under contageous or infectious diseases, or convicts, etc., from entering the State; while, for the purpose of self protection, it may establish quarantine and reasonable inspection laws, it may not interfere with transportation into or through the

State, *beyond what is absolutely necessary for self protection.*"

95 U. S. 465, *The H. & St. Joe R. R. Co.* v. *Husen.*

The Railroad Company conducting the traffic through the Territory is subject to the laws governing the Territory as to crossings and connections with other railroads therein. It is also subject to the law of the Territory which requires all passenger and freight trains to stop at all intersections with other roads and to receive at such points and carry all passengers and freight offered, and also to deliver at such points all passengers and freight destined to such points.

See Indian Territory Statutes 1899, Chap. 62, Sec. 3646.

This applies also to trains engaged in inter-state traffic and has been so decided. 166 U. S., 427, *Gladson* v. *Minnesota.*

It is therefore manifest that in conducting the traffic in question *there is and must be an intercourse with the Indian Territory and that such traffic is carried on and conducted into the midst of the Territory.* Suppose then that Congress should fix the rate per mile for transportation over the soil of the Indian Territory, and that such rate was different from that established by the Arkansas Commission for the same mileage. Here would be a conflict. Which would govern? Will it be contended that Congress would have no power to do so? Certainly not. Will it be contended that because Congress has not done so, Arkansas may? Certainly not, because *the non-action of Congress does not give to Arkansas the right to so act.* If Congress fixed a rate for the mileage in the Territory, it certainly would supercede that fixed by any other power, even if the other power had a right to act in the

absence of action by Congress, which, however, it has not. In that event we would have *a rate split into parts*, and different portions regulated by different jurisdictions; *whereas the Supreme Court, as we will see later, has said that a rate is a unit.* This would be the old difficulty over again, and which the Constitutional Convention sought to remedy.

VIII.

Character of a Rate.

The fixing of a rate, however, is not an arbitrary matter. It is not subject to the caprice of any power. It is well settled by this Court that the authority having the power to fix a rate must fix a reasonable rate, and the elements to be consulted in fixing a reasonable rate are equally well determined.

Upon this question this Court has said:

"In our judgment, it must be held that the reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons and property *wholly* within its limits must be determined without reference to the inter-state business done by the carrier, or to the profits derived from it. The State cannot justify unreasonably low rates for domestic transportation considered alone, upon the ground that the carrier is earning large profits on its inter-state business, over which, so far as rates are concerned, the State has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its inter-state business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on inter-state business, nor the latter the losses on domestic business."

169 U. S. (466) 541, *Smyth* v. *Ames.*

The Court, speaking further of the power of the State to prescribe rates, said:

"When it undertakes to prescribe rates not to be exceeded by the carrier, *it must do so with reference exclusively to what is* just and reasonable, as between the carrier and the public *in respect of domestic business.*"

169 U. S. *supra*, page 541.

In order to determine a reasonable rate, the Court further held that there must be considered the following matters, viz:

(1). The original cost of construction.

(2). The amount expended in permanent improvements.

(3). The amount and market value of its bonds.

(4). The present as compared with the original cost of construction.

(5). The probable earning capacity of the property under the particular rates prescribed by statute.

(6). The sum required to meet operating expenses.

169 U. S. *supra*, p. 547.

If, then, these elements are to be considered, and the determination of rates so far as a State is concerned, is to be confined to domestic business, how can the State of Arkansas undertake to determine rates for transportation *over territory other than its own?*

For example, what concern has the State of Arkansas with cost of construction in the Indian Territory, or with the amount spent for permanent improvements therein, or the probable earning capacity of the mileage within that Territory, or the amount required to meet operating expenses therein?

What right has it to inquire about these matters pertaining to the Indian Territory? It must, however, con-

sider in fixing a rate, elements of the character above mentioned, *but the mandate of this Court to the State is, you must do that at home, with respect to your own territory, within the bounds of your own jurisdiction and not beyond it.*

A rate, however, is a unit. It cannot be split into parts. It must be determined as an entirety. One jurisdiction cannot fix *one part of it* and another jurisdiction fix *another part of it.* Such is the decision of this Court.

118 U. S., 557, *Wabash &c Ry. Co.* v. *Illinois.*
169 U. S., 471, *Smyth* v. *Ames.*

Speaking upon the same subject *and illustrating the unity of a rate and the elements to be considered in determining it,* Judge Grosscup of the Northern District of Illinois, used the following language:

"There can be no doubt that to Congress is given, by the constitution, the absolute power to regulate commerce between the States. This power, independently of legislation, is not necessarily exclusive of the rights of the States to reasonably regulate such incidents of inter-state commerce, lying within their respective jurisdictions, as wharves, pilots, harbors, roads, bridges, etc. A wharf, harbor, or bridge, lying within a State is a tangible entity, over which the laws of the State extend. The cost of their creation and the expense of their maintenance make the imposition of tolls or charges not only reasonable, but necessary. These must be enforced by and subject to some law, and, in the absence of congressional legislation, there is no law except that of the State. The application of State law in such cases is not inconsistent with the general power conferred upon Congress, and does not introduce into commerce between the States either confusion or restraint. Such regulations may exist harmoniously with regulations imposed by other States upon wharves, harbors and

bridges within *their* territorial limits. *But the fixing of a rate for the carriage of goods from one State to another is not simply an incident of, or appurtenant to commerce, but is the very core and essence of inter-state commerce.* It is not a physical entity within the limits of a State, and it cannot be subject to regulation in one State without coming into interference with the equally rightful regulations of other States, and thus producing hopeless contradiction and confusion. How can Illinois determine what is a reasonable charge for carriage across Indiana, Ohio or Pennsylvania? The reasonableness of such rate depends, among other things, upon the cost of construction and wages paid beyond her jurisdiction; the amount of capitalization allowed, and taxes and assessments exacted, by other jurisdictions; the terms of contracts for the interchange of freight between carriers, made and allowed under the laws of other States; and the amount of traffic carried, which may, in turn, be affected by the laws of the other States governing the acquisition of, or consolidation with other lines. These, and many others, are the elements of the cost of carriage, and before the reasonableness of a rate can be determined, the cost must be ascertained. The reasonableness of rates for such long distances, and over different methods of conveyance, can only be approximately ascertained, at best, by men of special learning and equipment in such matters. Is it possible that the constitution contemplates that such learning can be found in the courts and juries of every county traversed by a line 1,000 miles long? *I am of the opinion that a rate for the carriage of Inter-state Commerce, dependent, as it is, for its reasonableness upon so many different considerations of expenditure, business and interpretations of the laws of different States, is essentially a national affair, and its regulation is therefore exclusively national. The rate of carriage is the heart pulse of commerce, and can be subject safely to a single course of restraint only. Many restraints, themselves entirely different* and inconsistent with each other, *would destroy the*

very possibility of uniformity or fixedness of rates. It follows, therefore, that in my opinion the local municipal law of the several States is not applicable to the reasonableness of these rates, and cannot be appealed to as a basis for suits such as these."

58 Fed., *Swift* v. *Philadelphia and Reading R. Co.*, (858) 860.

In reviewing the decisions upon this question, Mr. Prentice, in his treatise on the commerce clause of the constitution, uses the following pertinent language:

"If one State might regulate *with reference to mileage the charges* to be made by inter-state carriers for transportation within its limits, *another State might regulate the charge with reference to expense*, and the result might be that the carrier would be so limited in the several States through which it operated that he would not collect for the whole service a total charge which would be reasonable under the laws of all States. It is, therefore, well settled that a State may not regulate inter-state rates."

Commerce Clause of the Federal Constitution (By Prentice & Eagan), p. 284.

IX.

Power Over Territories.

The power over territories, in every respect, resides *exclusively* in the Congress of the United States. The Territory is the property of the United States, and not under the jurisdiction in any respect of any State. No power other than Congress or a territorial government by its permission, can make any regulation or pass any law affecting a Territory. It certainly does affect a Territory if a rate can be prescribed by another power to govern transportation over its soil, transportation which passes

into the midest of its people, and which by so doing, subjects itself to all those local laws relating thereto, which the Territory by permission of Congress has, in like manner as a State, the right to enact and which are not within the meaning of the constitution as to regulation of commerce among the States.

Upon the question of *exclusiveness* of the power of Congress over the Territories, we refer to the following decisions of this Court and the provision of the Federal Constitution. Said constitution provides as follows:

"The Congress shall have power to dispose of *and make all needed rules and regulations* respecting the Territory or other property belonging to the United States."

Article 4, Section 3.

An opinion by Chief Justice Marshall contains the following language:

"Perhaps the power governing a Territory belonging to the United States, which has not, by becoming a State, acquired the means of self government, may result necessarily from the facts that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned."

1 Pet., (541) 543, *American Ins. Co. et al.* v. *356 Bales of Cotton.*

In another case decided by this Court, the following language was used:

"The constitution of the United States (Article 4, Section 3), provides 'that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. The term territory as here used is merely

descriptive of one kind of property, and is equivalent to the word lands. And Congress has the same power over it as over any other property belonging to the United States, *and this power is vested in Congress without limitations* and has been considered the foundation upon which the territorial governments rest."

14 Pet., (534) 538, *U. S.* v. *Gratiot.*

Chief Justice Waite, in the case of *National Bank* against *County of Yankton,* said, in the year 1879:

"It is certainly now too late to doubt the power of Congress to govern the Territories. There has been some differences of opinion as to the particular clause of the constitution from which the power is derived, but that it exists has always been conceded. * * * *All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress.* The territories are but political subdivisions of the outlying domain of the United States."

The Court further held that such power was " an incident of sovereignty."

101 U. S., (129) 133, *National Bank* v. *County of Yankton.*

In a still later case this Court used the following language:

"The power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the Territory itself, and from the power given by the constitution to make all needful rules and regulations respecting the Territory or other property belonging to the United States."

136 U. S., (1) 42, *The Late Corporation of the Church of Jesus Christ of Latter Days Saints* v. *United States.*

Upon another occasion this Court, speaking of the laws of the Territories and having under consideration at the time the Territorial laws of Minnesota, said:

"The authority and effect of the Territorial laws of Minnesota upon the subjects within the legitimate bounds or cognizance of that Territorial Government, no person, it is presumed, will be disposed to question."

20 How., (558) 561, *Irvine* v. *Marshall, et al.*

Upon another occasion this Court held:

"That in case of a conflict between the organic act creating the Territory and any act of Territorial legislation, the act of Congress must prevail."

132 U. S., 632, *Clayton* v. *Utah.*

Other similar decisions have been made, and we quote the following from the syllabus of the case of the *United States* against *Coxe:*

"The Cherokee Nation are so far under the protection of the laws of the United States that they may be considered, for the purpose above named, *as a State or Territory* of the United States."

18 How., 100, *The United States to the use of James Mackey, et al.* against *Coxe.*

Further, as showing the power of the Territory to legislate and pass laws affecting persons and property within its bounds, and to regulate matters pertaining thereto so far as such laws do not intrench upon the exclusive powers of the Federal Congress, we quote the language of Chief Justice Chase, as follows:

"The theory upon which the various governments, for portions of the Territory of the United States, have been organized, has ever been that of leaving to the inhabitants all the powers of self government *consistent* with the supremacy and supervision of national authority

and with certain fundamental principles established by Congress."

13 Wall., (434) 441, *Clinton* v. *Englebrecht.*

In view of these authorities it seems to us that it would be idle to contend that the Indian Territory could not make and pass local laws *so far as Congress permitted,* which equally with similar laws passed by a State would control and govern as to matters of public health, like quarantine laws, as to matters of inspection, as to the speed of trains, as to stoppage of trains, both freight and passenger, at stations, as to connections with other railroads, and other matters *where such laws did not interfere with the power of Congress* to regulate commerce among States, *and if this be true, it would seem that the Indian Territory must be held to be affected by transportation through its limits equally as is a State by transportation through its limits, and that thus commerce moving across the Territory is intermingled with the Territory and its people and produces intercourse with the Territory within the definition of inter-state commerce as defined in the case of Gibbon against Ogden, reported in the 9th Wheaton, which will be spoken of hereafter.* It also seems clearly manifest, from the foregoing authorities, that there can be no question but that the exclusive power over the Territory resides in the Congress of the United States, and that no single State can pass any law or make any regulation that will affect commerce in any way while it is passing over or across the Territory.

X.

Specific Reservation by Congress over Rates in Indian Territory.

When the Kansas City, Pittsburg & Gulf Railroad Company, the predecessor of complainant, sought to enter and construct its road upon the soil of the Indian Territory, Congress, in like manner as it had done in the grants to other railroad companies, made special provisions in regard to the matter of rates, *and expressly asserted its right to regulate all rates.* This certainly shows that Congress holds that the power to regulate rates of transportation over the soil of the Indian Territory *is exclusively in it.* The language used is as follows:

"That said Roalroad Company shall not charge the inhabitants of said Territory a greater rate of freight than the rates authorized by the laws of the State of Arkansas for services or transportation of the same kind, *provided,* that passenger rates on said railroad shall not exceed three cents per mile. Congress hereby reserves the right to regulate the charges for freight and passengers on said railroad, and messages on said telegraph and telephone *lines until* a State Government shall be authorized to fix and regulate the cost of transportation of persons and freight within its respective limits by said railroad; but Congress *expressly reserves the right to fix and regulate at all times the cost of such transportation by said railroad or said company, whenever such transportation shall extend from one State into another,* or shall extend into more than one State; *provided, however,* that the rates of such transportation of passengers, local or inter-state, shall not exceed the rates above expressed; and *provided, further,* that said Railroad Company shall carry the mail at such price as Congress may by law provide, and until such rate is fixed by law the Post Master General may fix the rate of compensation."

U. S. Statutes at large, Vol. 27, p. 487.
Act of Congress, February 27, 1893.

The language used clearly manifests an intention on the part of Congress to keep within its power the right to regulate all rates *within the limits* of the Indian Territory. In other words, *Congress, by the act, asserts not only that it has in the Indian Territory the same power over domestic rates as a State would have which could be created out of the Indian Territory, but that as to commerce affecting the Indian Territory not purely domestic, it has the exclusive power over it in like manner as it has over commerce among the several States.* So far as commerce is concerned, relative to the States of the Union, the declaration of Congress in the above act places the Territory upon the same basis as a State. It says in effect, that the State of Arkansas can no more regulate commerce or transportation in the Territory than it could if the Territory were a State. It also asserts that when a State shall have been created out of the Territory it shall be limited in power to the regulation of rates *within its limits.* The language is:

"Congress hereby reserves the right to regulate the charges for freight and passengers on said railroad * * * *until a State Government shall be authorized to fix and regulate the cost of transportation of persons and freight within its respective limits.*"

This statement is in accord with the decisions of the Courts. *If, however, the State created out of the Indian Territory, could not regulate rates for transportation across the State of Arkansas, how can it be contended that the State of Arkansas can have such power as to its neighboring State, and if Arkansas could not have such power as to another State, why can it be said to have it with regard to the Indian Territory, when the only difference in the situation is that the power over such rates now rests in Congress instead of a State?*

Upon argument in the trial Court, is was suggested by counsel for appellants that the shipments in question did not constitute inter-state commerce, because they were between citizens of the same State, namely, citizens of the State of Arkansas. This, however, is no test; if it were, then a shipment from John Jones in the State of Arkansas *to himself* in the State of Missouri would not be inter-state commerce, and a shipment from John Jones, a citizen of Arkansas, from one point in Arkansas to John Smith, a citizen of Missouri, to another point in Arkansas, and where the transportation was performed wholly within the State of Arkansas, would be inter-state commerce. This is absurd. The expression, therefore, between citizens of different States, it will be readily seen, is no guide. The expression "between different States," sometimes found in the books, clearly fails as a guide; as for example, the "State of Arkansas" might make a shipment consigned to the "State of Missouri" from a point in Arkansas to another point in Arkansas, and the transportation might be wholly performed in the State of Arkansas, but this would not be inter-state commerce. It is manifest that in order to have inter-state commerce something more is necessary than a transaction between citizens of different States or between different States, *and as heretofore shown, commerce becomes inter-state when, and only when, it is carried in or into the midst of a State other than that of its origin.*

XI.

Criticisms of Decisions Upon which the Arkansas Commission Predicated its Decision.

Before proceeding to the citation of the cases which support the contention of appellee, we will refer to the cases relied upon by the Arkansas Railroad Commission for the decision which gave rise to the present controversy. That decision is made to depend upon the following cases:

9 Wheat., 1, *Gibbon* v. *Ogden;*

145 U. S., 192, *Lehigh Val. Rld. Co.* v. *Pennsylvania;*

119 Mo., 222, *Sewell* v. *K. C., Ft. S. & Mem. Rld. Co.;*

113 North Car., 213, *State* v. *Western U. Tel. Co.;*

116 North Car., 211, *Leavell* v. *Western U. Tel. Co.;*

86 Iowa, 587, *Campbell* v. *C. M. & St. P. Ry. Co.;*

53 N. W., 151, *Campbell* v. *C. M. & St. P. Ry. Co.*

The case of *Gibbon* v. *Ogden* is one upon which we rely as an authority for our contention, and of this we speak later. An examination of the other said cases will disclose that all of them depend upon and were decided after the case of the *Lehigh Valley Railroad Co.* v. *State of Penn.*, reported in 145 U. S., beginning on page 192. If the Lehigh Valley Railroad Co. case cannot be made an authority for the opinion of the Arkansas Commission, no help can be obtained from the Iowa case or Missouri case or the two North Carolina cases, because they proceed upon the basis of the Lehigh Valley Railroad

case, and were decided upon the strength of the opinion in that case. Said Lehigh Valley Railroad case was decided by this Court on May 2d, 1892. The Missouri case relied upon in the opinion of the Arkansas Railroad Commission was decided December 23d, 1893. The Iowa case relied upon in said opinion was decided October 24th, 1892. The first North Carolina case relied upon was decided November 21st, 1893, and the second North Carolina case relied upon was decided April 2d, 1895. The Missouri case is reported in Volume 119, Missouri Supreme Court Reports, beginning on page 222, and is entitled *Seawell et al.* v. *Kansas City, Ft. Scott & Memphis Rld. Co.* In that case the Court refers to the decision of the Supreme Court of the United States in the Lehigh Valley Railroad case and upon page 240 states that it regards this decision of this Court as decisive of the question under consideration.

The Iowa case is reported in volume 86 of the Iowa Reports, beginning on page 587, and is entitled *Campbell et al. Railroad Commissioners* v. *Chicago, Milwaukee & St. Paul Ry. Co.* Upon page 590 of the opinion the Court refers in specific terms to the opinion of this Court in the said Lehigh Valley Railroad case and depends upon it as an authority for its opinion.

The first North Carolina case relied upon is that of *State ex rel. Railroad Commission* v. *Western Union Tel. Co.,* and will be found reported in Southeastern Reporter, volume 18, beginning on page 389. Upon page 391 of said volume the Supreme Court of North Carolina refers specifically to the opinion of this Court in said Lehigh Valley Railroad case, and depends upon it as an authority for its decision.

The second North Carolina case relied upon is entitled *Leavell* v. *Western Union Tel. Co.*, and will be found in the 21st Southeastern Reporter, beginning on page 391, and the Court upon said page 391 of said Reporter expressly refers to the opinion of this Court in said Lehigh Valley Railroad case, and depends upon it for its decision.

It seems, therefore, only necessary to consider the Lehigh Valley Railroad case itself. It will be found reported in the 145 U. S., beginning on page 192; the language of the Court in stating the facts is as follows:

"The Lehigh Valley Railroad Company is a corporation, which owns and operates an extensive system of railroads in that State, but has no line of its own to Philadelphia. For the traffic from Mauch Chunk to Philadelphia it makes use of two routes, one by the way of the Philadelphia & Reading road, being wholly within the State, and the other by its own line connecting with the lines of the Pennsylvania Railroad at Phillipsburg, N. J., and thence via Trenton, in that State, to Philadelphia. The detailed reports of its receipts show that the passenger traffic of the Lehigh Valley Company to Philadelphia from Mauch Chunk, is almost wholly taken over the Philadelphia & Reading, while its coal and general freight traffic reaches Philadelphia by the other road. Phillipsburg, N. J., lies across the Delaware River opposite Easton, Pennsylvania. By the running arrangements between the Lehigh Valley and Pennsylvania Companies, the transportation of other freight and passengers is continuous from Mauch Chunk to Philadelphia. The receipts named in class two are *confined* to that part of the transportation from Mauch Chunk to Phillipsburg, and *the taxation to the mileage wholly within the State* of Pennsylvania, and the question is whether *this taxation* in respect of such receipts from freight and passengers carried by continuous transportation to Philadelphia from

Mauch Chunk by way of Trenton, N. J., amount to a regulation of inter-state commerce."

We respectfully submit that the Lehigh Valley Railroad case *is a case purely of taxation and therefore has no bearing upon and ought not to be applied to the question of the power of a State to fix and regulate a rate for the transportation of freight or passengers.*

We further submit that the case is an authority only for the taxation by a State of receipts of transportation *for that portion thereof performed wholly within the limits of the State imposing the tax.* It will be observed that in the statement upon which the State of Pennsylvania made the settlement with the Railroad Company for the taxes there is set forth as the first item the gross receipts and there is set forth as the *second item the proportion thereof taxable in the State of Pennsylvania.*

See page 192, 145 U. S.

The language of the opinion clearly shows that it was not intended to declare that a State had the right or power to tax said gross receipts *or to regulate inter-state commerce by laying taxes upon receipts derived therefrom.* The Court says, page 200:

"And while inter-state commerce cannot be regulated by a State by the laying of taxes thereon in any form, yet *whenever the subjects of taxation can be separated so that which arises from inter-state commerce can be distinguished from that which arises from commerce wholly within the State,* the distinction will be acted upon by the Courts and the State permitted to collect that arising upon commerce *wholly within* its own territory."

It will therefore be observed that the entire doctrine of the Lehigh Valley Railroad case and the language therein used *was with reference to the question of taxa-*

tion and the question whether there could be a taxation by the State upon a portion of the Railroad Company's receipts ascertained by the proportion of mileage wholly within the State imposing the tax. *The entire doctrine of the case is simply that a State may without violating the Constitution of the United States in regard to the regulation of commerce impose a tax upon that portion of the railroad receipts earned by and derived from mileage wholly within the State. The case limits the exercise of State power to that which happens wholly within the limits of the State. It does not permit the State power to affect anything beyond the limits of the State.* It allows to be determined for the purpose of taxation, the amount of receipts earned within the State upon the proportion of the mileage wholly within the State to the mileage of the total transportation. This is the full extent of the doctrine and we respectfully submit that the case *is no authority upon the question of the power of a State to determine and fix a rate for the transportation of freight or passengers, and is only an authority in regard to the matter of taxation.*

We further submit that *the question of taxation and the question of fixing a rate are two totally different things* and that the doctrine of the one should not be applied to the doctrine of the other.

Taxation depends upon the needs and necessities of the State, but a rate for transportation depends upon the right to charge reasonable compensation for a service performed. Taxation also is capable of apportionment as indicated by the cases, *but a rate is a unit,* an entire thing, as decided by this Court.

If it be undertaken to apply the doctrine of the Lehigh Valley Railroad Company case to the case at bar, then it would simply go to the extent of authorizing the State of Arkansas to fix a rate for that proportion of the transportation in question determined by the mileage wholly within the State of Arkansas. This, as elsewhere shown, cannot be allowed, for it would be a return to the very evil sought to be prevented by the commerce clause of the Constitution, namely, allowing different jurisdictions to fix different portions of the same rate. The doctrine that a rate is a unit wholly excludes the matter of a rate from the application of the doctrine of taxation.

The Lehigh Valley Railroad decision passed under the review of the Inter-state Commerce Commission, in a decision rendered on March 13, 1897, in case of *Milk Producers' Protective Association* against *Delaware Lakawanna Railroad Company, et al.* In regard to the Lehigh Valley Railroad decision the Commission used the following language:

"We have carefully examined and considered the Lehigh Valley decision with a view of determining whether it is actually controlling as claimed by counsel. The case involved the right of the State of Pennsylvania to tax the receipts of the Lehigh Valley Company from traffic shipped from points in that State but passing through New Jersey in the course of transportation, so far *as such receipts arose from service over the Lehigh Valley mileage within the State of Pennsylvania.* There was no dispute as to the amount of the tax and the only question raised was, whether the State could lay a tax upon the business at all. The Supreme Court upheld the validity of the tax involved. Whatever other or broader application may be given to language used or principles considered by the Court in that case, the decision *was con-*

fined to the question of taxation on what was done or earned within the State."

7 Inter-state Com. Reports, page (92) 160-161.

Milk Producers Protective Association against The Delaware Lackawanna & Western Railroad Company, et al.

The same distinguishing feature of the Lehigh Valley case is pointed in the work of Messrs. Prentice & Eagan.

See Commerce Clause of Fed. Const. (By Prentice & Eagan), page 90.

XII.

The Commerce in Question is Interstate Commerce.

We assert that in order for commerce to be domestic commerce of a State the transportation must not only begin and end within the same State but that the entire transportation must be within that State. See the following authorities:

19 Fed., (679) 702, *Louisville & N. R. Co.* v. *Railroad Commission of Tenn.;*

18 Fed., (10) 13, *Pacific Coast Steamship Co.* v. *Board of Railroad Commissioners;*

102 U. S., (541) 543, *Lord* v. *Steamship Co.;*

41 N. W. Rep., (1047) 1048, *State ex rel Rld. Commissioners* v. *C., St. P., M. & N. Ry. Co.;*

7 S. E. Rep., (836) 837, *Sternberger* v. *Cape Fear & Y. V. R. R. Co;*

7 Interstate Com. Reports (92) 160-161, *Milk Producers Protective Association* v. *Delaware & Lackawanna Railroad Company;*

2 Inter-state Com. Reports, 375, *New Orleans Cotton Ex.* v. *Cincinnati, N. O. T. P. R. Co.;*

95 U. S., 485, *Hall* v. *DeCuir;*
24 U. S. Stat. at Large, 379 (*Inter-State Com. Act*).

In the case of the Louisville & Nashville Railroad Company against Railroad Commission of Tenn., above cited, the Court, speaking of the rights of the State to exercise power over transportation, say:

"*If it be domestic transportation wholly within the State, they may;* nor does is cease to be wholly within because the thing transported has come from without, nor because is may be destined to go, ultimately, beyond the state; *but the particular transportation for which the charge is made must be wholly within the State. If it be partly within and partly without, the State cannot regulate* that within and leave the Federal power to act upon that without, *but has no control whatever over the charges for such transportation.* It is in the very nature of the thing itself not local or of domestic concern, and the States have no more power by such a construction or characterization to regulate the rates by the uniform legislation suggested by the section of the act just quoted (the local law) than they have to so regulate the rates of postage or the weights of coins. That Congress refrains from establishing such uniform regulation only indicates an expression of the Federal will that the rates shall be left to regulate themselves under the ordinary economic laws that govern the commerce between the States."

Supra 19 Fed., page 702.

In the case of *Pacific Coast Steamship Company* v. *The Board of Railroad Commissioners,* above cited, and where the transportation was from San Francisco to San Diego, in California, and was by vessel which in the voyage passed beyond the distance of a marine league from the shore, the Court said:

"Nor are the vessels engaged in purely domestic commerce when their voyages *between ports of the same State require them to navigate the ocean.* When they go beyond the marine league they pass out of the jurisdiction of the State, and come under the exclusive control of Congress. *To bring the transportation within the control of the State,* as part of its domestic commerce, *the subject transported must be within the entire voyage, under the exclusive jurisdiction of the State.*"

Supra 18 Fed., page 13.

In the case of *Lord* against *Steamship Company,* which was likewise a transportation by vessel between the ports of San Francisco and San Diego, California, Mr. Chief Justice Waite used the following language:

"The single question presented by the assignment of errors is, whether Congress has power to regulate the liability of the owners of vessels navigating the high seas, but *engaged only in the transportation of goods and passengers between ports* and places in the same State. It is conceded that, while the Ventura carried goods from place to place in California, her voyages were always ocean voyages.

Congress has power to regulate commerce with foreign Nations and among the several States, and with the Indian Tribes, (Constitution, Article 1, sec. 8), but it has nothing to do with the purely internal commerce of the States, that is to say, with such commerce as is carried on between different parts of the same State, if its operations are confined exclusively to the jurisdiction and Territory of that State, and *do not affect other Nations or States or the Indian Tribes.*"

The Court further said:

"Commerce includes intercourse, navigation, and not traffic alone. This was also settled in *Gibbons* v. *Ogden.* Commerce with foreign Nations, says Mr. Justice

Daniel for the Court, in *Veazie* v. *Moor*, (14 How., 568) must signify commerce which, in some sense, is necessarilly connected with these Nations, transactions which either immediately or at some stage of their progress must be extra territorial.

The Pacific Ocean belongs to no one Nation, but is the common property of all. When, therefore, the Ventura went out from San Francisco or San Diego on her several voyages, she entered on a navagation which was necessarily connected with other Nations. While on the ocean her national character only was recognized, *and she was subject to such laws as the commercial Nations of the world had*, by usage or otherwise, *agreed on for the government of vehicles of commerce occupying this common property of all mankind.* She was navigating among the vessels of other Nations and was treated by them as belonging to the country whose flag she carried. *True, she was not trading with them, but she was navigating with them, and consequently with them she was engaged in commerce."*

Supra 102 U. S., pages 543, 544. *Lord* v. *Steamship Co.*

In the case of New Orleans Cotton Exchange, above quoted, the Commission used the following language:

"All commerce is subject to regulation, that *wholly within a State* and subject to its sovereign power by the State; that among the States and with foreign Nations and not *wholly within the sovereign* power of any one State by the United States, for the reason that to be effectual, regulation must be uniform, at least not conflicting. Commerce between Shreveport and New Orleans, while crossing on the ferry between Delta, La., and Vicksburg, Miss., is not subject to regulation by the State of Louisiana. The business of transferring freight by the ferry between the two States is Inter-state Commerce. *Gloucester Ferry Co.* v. *Pa.*, 114 U. S., 196, 1 Inter-state Commerce Report, 382.

While passing through Mississippi after passing from Louisiana, this commerce is Inter-state, and subject alone to Inter-state regulations. It is not subject at any place between Shreveport and New Orleans to regulation by both the State and the Congress. It passes by continuous carriage from Louisiana to, and through the State of Mississippi. It is not transportation *'wholly within one State.'* It is subject to regulation by the provision of the Act to Regulate Commerce; and the Commission had jurisdiction to revise the rates when the parties interested in them are before it."

2 Inter-state Commorce Reports, 375. *New Orleans Cotton Exchange* v. *Cincinnati, &c., Rld. Co.*

In the case of Milk Producers' Protective Association above quoted upon this same subject, and also dealing with the Lehigh Valley case, the Inter-state Commerce Commission said:

"The Supreme Court called attention in that decision to the fact that the case *was one of taxtion and not one of direct regulation, citing Pacific Coast Steamship Co. v. Board of Railroad Commissioners,* 9 Sawyer, 253, as indicating the distinction. In the case so cited the California Commission sought to regulate commerce between ports of that State when carried by a line of vessels navigating the Pacific ocean more than a marine league from the shore. Mr. Justice Field, sitting as Circuit Justice and writing the opinion said, 'to bring the transportation within the control of the State as part of its domestic commerce *the subject transported* must be *within the entire voyage under the exclusive jurisdiction of the State.* That decision seems to rest entirely upon the Commerce clause in the Constitution of the United States. If the steamship or vessel plying between California ports was, while on the ocean engaged in commerce with foreign Nations as was observed in the Lehigh Valley decision in

discussing *Lord* v. *Goodall N. & P. Steamship Company*, 102 *U. S.*, 541, *then a railroad company in carrying between points in the same State by a route which passes through another State is as clearly engaged in commerce among the States while operating in the second State.* The effect in either case is to deny the jurisdiction of the State wherein a shipment commences and terminates to regulate transportation *over the entire distance when the route passes beyond its borders."*

7 Inter-state Commerce Reports, pages 160, 161, *Milk Producers Protective Association* v. *Delaware & Lackawanna Rld. Co.*

In the case of *State ex. rel. Railroad & Warehouse Commission* v. *Chicago, St. P., M. & O. Ry. Co.*, above cited, the Court in dealing with a similar question used the following language:

"By section 8, Art. 1, Constitution U. S. Congress is empowered 'to regulate commerce with foreign nations, and among the several States.' The *transportation* of property by a common carrier, including the rates to be charged therefor, is embraced within the meaning of the word 'commerce,' as here used. *Gibbons* v. *Ogden*, 9 wheat. 1; Case of *State Freight tax*, 15 Wall. 232; *Lord* v. *Steamship Co.*, 102 U. S., 541; *Railway Co.* v. *Illinois*, 118 U. S., 557, 7 Sup. Ct. Rep. 4; *Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. Rep., 1118; *Fargo* v. *Michigan*, 121 U. S., 230, 7 Sup. Ct. Rep., 857; *Carton* v. *Railroad Co.*, 59 Iowa, 481, 13 N. W. Rep. 67. Since the decision in *Railroad Co.* v. *Illinois*, 118 U. S. 557, 7 Sup. Ct. Rep. 4, it must be regarded as settled, whatever doubts may have been previously entertained, that the regulation, as by prescribing rates of such transportation as is to be deemed inter-state as distinguished from wholly domestic carriage is exclusively given to Congress. The only question upon which there can be any doubt is whether the transportation to which this order of the

commission relates is to be deemed commerce or transportation between different States, within the meaning of the constitutional provision above quoted, or as being in its nature merely domestic commerce or transportation, to be governed wholly by our state laws, and over which Congress has no control. *The order prescribing rates, and to enforce the observance of which is the object of this proceeding, applies to the entire route from Duluth to Mankato—a large part of which—indeed, the greater part of which—lies beyond the boundaries of our State, and within the territory of another sovereignty. These rates are for the continuous carriage of freight over the entire route, including the transit of* 148 *miles through the State of Wisconsin. The order is as applicable to that part of the line as to that which is within our own State, and can only be sustained upon the theory that the railroad and warehouse commission of the State of Minnesota has authority to determine what charges may be made for the transportation of freight by a common carrier through the State of Wisconsin, provided only that the carrier receives this property within the State, and is to carry it through the foreign State to a destination within our own borders.*

In view of the above decisions of the Supreme Court of the United States, that the *transportation* of freight by a common carrier, apart from considerations of contract concerning the property as between the shipper and the consignee, is a subject of 'commerce,' to which the constitution applies, *it is not a matter of controlling importance that the consignor and consignee, or place of shipment and destination, be within the same State, if the transportation is through a foreign State.* Assuming that the constitution places within the exclusive control of Congress the subject of transportation among the several States, let us suppose that a shipment is made from Duluth to Winona—both cities being without our State, but upon the borders of Wisconsin—by a route wholly within the latter State, excepting the inconsiderable dis-

tance of the depot grounds in those cities from the State line. Can is be said that this carriage of perhaps 200 miles through the State of Wisconsin, and of a mile or two within our own borders, is domestic transportation and commerce, as distinguished from that which, under the constitution, is to be deemed as being 'among the several States?' The constitution as interpreted by the Court whose decisions upon this subject are final, has placed under the exclusive regulation of Congress the subject of transportation among the States, so far among other things, as relates to the matter of charges, in order that it may be protected from conflicting and adversely discriminating State legislation. See authorities above cited. Is not a case such as we have supposed, of the case now before us, transportation among the States, within this purpose of the constitution, as really as would be a shipment and transportation of goods from New York, Chicago or Milwaukee to Minnesota, as to which unquestionably, under the decisions above cited, Congress, and not the several States, would have the power to regulate? We are unable to state any principle which supports the relator's claim of jurisdiction to determine what charges may be ma le for the transportation of freight through the State of Wisconsin. Whether the result would have been different if the order had prescribed rates only with respect to so much of the route as is within our own State we do not decide. *The mere fact that Duluth and Mankato are both in this State, and that a part of the line of road of this respondent is also here, and operated under our law, cannot authorize our State authorities to regulate the operations of the 148 miles of road which is wholly within the State of Wisconsin, and which there exists, and is managed, of course, under the laws of that State, subject to such limitations as the National Constitution may impose.* The order in question applies to all freight transported over this route from Duluth to Mankato. But it appears that in the usual course of business the respondent re-

ceives freight at the docks in Duluth destined for the several ports on its road, both in Wisconsin and in this State which had been received there from vessels navigating the great lakes, and which, as is to be inferred, must be classed as inter-state commerce in any meaning of that term. Of course, as to such transportation our Commission has no authority to prescribe rates under the decisions above cited. There might perhaps be distinguished from this case the case of a Minnesota carrier engaged only in carrying between points within this State, but whose route incidentally at some point, and for an inconsiderable distance should cross the line of the State. Whether or not the transportation in such a case might be deemed to be substantially domestic, and not embracing an important element of foreign transit, we do not decide. This is not such a case. This line within Wisconsin, to which this order is applicable, was operated not merely for transportation between points in Minnesota, but was doing the ordinary business of a common carrier within the State of Wisconsin.

The question under consideration has not come before the Supreme Court of the United States in the form here presented; but it seems to us that that Court has so determined the construction and effect of the commerce clause in the Constitution that, following its decisions, as we are bound to do in such cases, the result already indicated cannot be avoided. We need not again refer to the many decisions, some of which have been cited, which leave no doubt that transportation is commerce within the meaning of the constitution, and that the authority of Congress is exclusive as respects the regulation of rates for inter-state commerce.

In *Lord* v. *Steamship Co.*, 102 U. S., 541, the question presented for decision was whether Congress had the power to regulate the liability (to owners of goods lost in the course of transportation) of the owners of vessels engaged only in transportation between different ports in the same state, (Calfornia) the voyage between

such ports being in part upon the high seas, and out of the limits of the State. The Court recognized the fact that Congress had no power to thus interfere with the exclusively internal commerce of a State, and that the law of Congress (restricting the common-law liability of carriers) could be sustained in its application to this case, only in case the transportation in question should be deemed to be within the clause of the constitution empowering Congress 'to regulate commerce with foreign nations and among the several States.' It was decided that such transportation was included in 'commerce with foreign nations,' a matter of 'external concern' as respected the State of California, and subject to the regulating power of Congress. If such transportation from San Francisco to San Diego, in the same State, was 'foreign' commerce (transportation) within the meaning of the constitution, because the voyage was for the most part upon the high seas, the common highway of nations, is not the transportation from Duluth to Mankato, *by a route which for the most part is wholly within the territory of Wisconsin*, commerce (transportation) among the several States?' *Has not the State of Wisconsin at least as much interest and as large a jurisdiction concerning the transit of goods by carrier across its territory as have the nations of the world, including our own, in the voyage merely from port to port in the State of California?* How can the one be deemed foreign and the other exclusively internal, as respects the State of Minnesota? We are unable to make any distinction, and it seems to us that our decisions must be controlled by that above cited. *Steamship Co.* v. *Board*, 9 Sawy., 253, 18 Fed. Rep., 10, was like that last cited, except that the question related to the power of the State authorities of California to regulate rates of transportation upon steam vessels between various ports in that State. That authority was denied for the reason that it was not domestic commerce, the vessel in the course of the voyage going out to sea more than a league from land. Field, J., wrote the opinion of the Circuit Court.

A case closely analogous to that under consideration was very recently decided by the Supreme Court of South Carolina, in *Sternberger* v. *Railroad Co.*, 7 S. E. Rep., 836. The defendant was charged with violating statute of that state which forbids a higher charge for a shorter than for a longer carriage. The property had been shipped from Charleston to Tatum—both places being within that State. The course of transit from Charleston was, first, over two railroads wholly within the state; then to a point in North Carolina over a road operated in both states; then for some distance within North Carolina, over a road wholly within that State, then it was received in North Carolina by the defendant road, which was operated in both states, and transported to its destination at Tatum. The charge exacted for the entire distance was $4.40, while the freight to a point six miles further would have been only $4. It was held that the railroad commission of South Carolina had no jurisdiction to fix rates for such transportation; nor does the decision seem to rest entirely upon the fact that one of the roads in this route was wholly in North Carolina. That fact, as we think, should not have affected the result.

The Inter-state Commerce Commission has recently (November, 1888) ruled upon the question here presented, holding that commerce between points in the same State, but which in being carried from one place to the other, passes through another State, is inter-state commerce, subject to Congressional regulation, *Cotton Exchange* v. *Railway Co.*, 2 Interst. Com. R., 375. We are aware that the Supreme Court of Pennsylvania has held to the contrary. *Com.* v. *Railroad Co.*, 17 Atl. Rep., 179. If those cases were wholly analogous to that before us, that Court has not regarded the decision of the Court of last resort in such cases, in *Lord* v. *Steamship Co.*, *supra*, as having the effect which we think must be accorded to it.

Our conclusion is that the commission had no juris-

diction to prescribe rates for transportation through the State of Wisconsin."

Supra 41 N. W. Rep., (1047), 1049.

In the case of *Sternberger* v. *Cape Fear &c. Rld. Co.*, above cited, the Court decided that transportation between two points in the same State over connecting railroad lines, one of which lies wholly in another State, is interstate commerce and beyond the jurisdiction of the South Carolina Railroad Commission. Among other things the Court said:

"Now while it is admitted that our State railroad commission has jurisdiction over all railroads commencing and terminating in the State, and over all transportation between points within the State, yet it is equally true, that it has no jurisdiction over transportation running from the State into another State, or *from another State into this State or running entirely in another State.*"

Supra 7 S. E. Rep. 37, *Sternberger* v. *Cape Fear &c., Rld. Co*

In the case of *Wabash &c. Ry. Co* v. *Illinois*, above cited, in which the Court was discussing the effect of the statute of Illinois in regard to the regulation of rates and that portion of transportation performed within the State of Illinois, the Court used the following language:

"If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the State disconnected from continuous transportation through or into other States there does not seem to be any difficulty in holding it to be valid. For instance, a contract might be made to carry goods for certain prices from Cario to Chicago or from Chicago to Alton. The charges for these might be within the competency of the Illinois legislature to regulate, *the reason for this is that both the charge* and the actual

transportation in such cases are exclusively confined to the limits of the territory of the State and is not *commerce among the States or interstate commerce, but is exclusively commerce within the State.*"

118 U. S., pages 564-565, *Wabash &c. Rld. Co.* v. *Ill.*

In the same case the Court used the following language, see page 572:

"If each of the States through whose territories these goods are transported can fix its own rules for prices for modes of transit, for times and modes of delivery, and all the other instances of transportation to which the word regulation can be applied, it is readily seen that the embarrassments upon inter-state transportation as an element of inter-state commerce might be too oppressive to be submitted to."

108 U. S., *Wabash, &c., R. R. Co.* v. *Illinois,* page 572.

XIII.

Interstate Commerce and Federal Control.

The authorities seem to be clear that when transportation crosses a State line, the commerce becomes intermingled with and is among the different States or jurisdictions upon whose territory the carriage is performed.

Gibbons v. *Ogden,* 9 Wheat., 1.

In this case Chief Justice Marshall uses the following language:

"The words are: 'Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes.'

The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of

enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying or selling, or to the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

If commerce does not include navigation, the government of the union has no direct power over that subject and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised by the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word 'commerce' to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce including navigation was one of the primary objects, for which the people of America adopted their government and must have been contemplated in forming it. The convention must have used the word in that sense; because all have understood it in that sense, and the attempt to restrict it comes too late.

If the opinion that 'commerce,' as the word is used in the constitution, comprehends navigation also, requires

any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself.

It is a rule of construction, acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power, that which was not granted—that which the words of the grant could not comprehend. If, then, there are in the constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions and prescribed these inhibitions, understood the power to which they applied as being granted.

* * * * * * * *

The word used in the constitution then, comprehends, and has always been understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word 'commerce.'

To what commerce does this power extend? The constitution informs us, to commerce ' with foreign nations, and among the several States and with the Indian tribes.'

It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which the power does not extend. It has been truly said, that commerce, as the word is used in the constitution, is a *unit*, every part of which is indicated by the term.

If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, *and remain a unit*, unelss there be some plain intelligible cause which alters it."

Commerce is again defined in the famous passenger cases, the same being known as *Smith* v. *Turner* and *Norris* v. *City of Boston*, reported in 7 Howard, page 283.

Mr. Justice Wayne, in delivering the opinion, says on page 416:

"Commerce between nations or among States has several branches. Martens, in his summary of the Laws of Nations, says: 'It consists in selling the superfluity; in purchasing articles of necessity as well productions as manufactures; in buying from one nation and selling to another, *or in transporting the merchandise* from the seller to the buyer to gain the freight.'

'Generally speaking, the commerce in Europe is so far free that no nation refuses positively and entirely to permit the subjects of another nation, when even there is no treaty between them, to trade with its possessions in or out of Europe, or to establish themselves in its territory for the purpose. A State of war forms here a natural exception. However, as long as there is no treaty existing, *every State retains its natural right to lay on such commerce whatever restriction it pleases.*'

* * *

In all of the foregoing particulars Congress may act legislatively. It is conceded that the States may not do so in any one of them."

In the State Freight Tax Case, known as *Reading Railroad Co.* v. *Pennsylvania*, 15 Wall., 232, the Court in speaking through Mr. Justice Strong, says:

"Considering it, then as manifest that the tax demanded by the Act is imposed, not upon the company, but upon the freight carried, and because carried, we proceed to inquire whether, so far as it affects commodities *transported through the State* or from points without the State to points within it, or from points within the State to points without it, the Act is a regulation of

inter-state commerce. Beyond all question the transportation of freight or of the subjects of commerce for the purpose of exchange or sale, is a constituent of commerce itself. This has never been doubted, and probably the transportation of *articles of trade from one State to another was the prominent idea* in the minds of the framers of the Constitution when to Congress was committed the power to regulate commerce among the several States. *A power to prevent embarrissing restrictions by any State was the thing desired.* The power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign Nations. It would be absurd to suppose that the transmission of the subjects of trade from the State to the buyer or from the place of production to the market, *regardless of the point of origination and the point of destination*, was not contemplated, for without that there could be no consummated trade either with foreign nations *or among* the several States.

In his work on the Constitution, sec. 1057, Judge Story asserts that the sense in which the word 'commerce' is used in that instrument includes not only the traffic, but intercourse and navigation. And in the passenger cases, 7 How., 416, it was said: 'Commerce consists in selling the superfluity and purchasing articles of necessity, as well products as manufactures, in buying from one Nation and selling to another, or in transporting the merchandise from the seller to the buyer to gain the freight.' Nor does it make any difference whether this intercourse of goods from the seller to the buyer is intercourse. Among the States, it must have been principally by land when the Constitution was adopted."

Appellee's position is clearly sustained by this Court in the case of *Lord* v. *Steamship Co.*, 102 U. S., 441.

The following is included in the statement of the case:

"The steamship Ventura, owned by the defendant in error, was employed in navigation between San Francisco and San Diego, in the State of California, touching at the intermediate ports on the coast. In making her voyages she ran a distance of 480 miles on the Pacific Ocean. She formed a part of a transportation line which was largely engaged in foreign and inter-state commerce, but was herself only employed on her own route, and neither took on nor put off goods outside of the State of California. While on one of her regular voyages from San Francisco to San Diego she was totally lost, with all her pending freight and cargo, on the coast of California, without the privity or knowledge of her owner. This suit was brought against her owner as a common carrier to recover the value of the goods lost."

In rendering the decision, Mr. Chief Justice Waite says:

"The single question presented by the assignment of errors is, whether Congress has power to regulate the liability of the owners of vessels navigating the high seas, *but engaged only in the transportation of goods and passengers between ports and places in the same State.* It is conceded that, while the Ventura carried goods from place to place in California, her voyages were always ocean voyages.

Congress has power 'to regulate commerce with foreign nations and among the several States, and with Indian tribes,' but it has nothing to do with the purely internal commerce of the States; that is to say, with such commerce as is carried on between different parts of the same State, *if its operations are confined exclusively to the jurisdiction and Territory of that State, and do not affect other nations or States or the Indian tribes.* This has never been disputed since the case of *Gibbons* v. *Ogden*, 9 Wheaton, 1. The contracts sued on in the present case were in effect to carry goods from San Francisco to San Diego by way of the Pacific Ocean. They

could not be performed except by going, not only out of California, but out of the United States as well.

Commerce includes intercourse, navigation, and not traffic alone. This was also settled in *Gibbons* v. *Ogden*, *supra*. Commerce with foreign nations, says Mr. Justice Daniel for the Court in *Veazie* v. *Moor*, 14 How. 568, 'must signify commerce which, in some sense, is necessarily connected with these nations, transactions, which either immediately or at some stage of their progress must be extra-territorial.'"

In *Pacific Coast Steamship Co.* v. *Board of Railroad Commissioners* (Calf.), 18 Fed. Rep., 10, the syllabus is as follows:

"The State Board of Railroad Commissioners has no power to regulate or interfere with the transportation of persons or merchandise, by a steamship company, between ports within the state, if they be in transit to or from other states, or when in navigating the ocean the vessel goes beyond a marine league from the shore. This power has been conferred upon Congress, and is exclusive."

The Court, speaking through Mr. Justice Field, says:

"Nor are the vessels engaged in purely domestic commerce when their voyages between ports of the same State require them to navigate the ocean. When they go beyond the marine league they pass out of the jurisdiction of this State, and come under the exclusive control of Congress. *To bring the transportation within the control of the State, as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the State. Lord* v. *Steamship Co.*, 102 U. S. 541.

If the steamships of the plaintiff carried any persons or merchandise between ports of the State *not going out, on their voyage between these ports, of the jurisdiction of the State,* and the persons or merchandise carried

not coming from any other state or foreign country, or going to another state or country, the transportation commencing and ending in the State, then to that extent the railroad commissioners might have jurisdiction to regulate the fares and freight for transportation on the vessels between ports of the State,—that is, between San Francisco and such ports along the coast,—they pass out upon the ocean beyond a marine league from the shore. They are, therefore, engaged in no transportation which the commissioners can regulate."

18 Fed. Rep., page 10, *Supra.*

In the case of *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S., 196, the following language was used, bearing on the meaning of the word "commerce."

"Commerce among the States consists of intercourse and traffic and includes the transportation of persons and property and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed; that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted are of infinite variety. While with reference to some of them which are local and limited in their nature or sphere of operation, the states may prescribe regulations until Congress intervenes and assumes control of them, yet, when they are national in their character and require uniformity of regulation affecting alike all the states, the power of Congress is exclusive."

In the commerce clause of the Constitution, the word "among" appears, the meaning of which is clearly defined by Chief Justice Marshall in the case of *Gibbons* v. *Ogden, supra,* as follows:

"The subject to which the power is next applied, is to 'commerce among the several States.' The word 'among' means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State, *but may be introduced into the interior.*

It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or effect other states. Such a power would be inconvenient, and is certainly unnecessary."

In *Sternberger* v. *Cape Fear Ry. Co.,* 7 S. E. Rep., 837, the Court says:

"Or it may be conducted and engaged in between individuals living in different States, *or transported over railroads lying in and running through different States.* It is then inter-state commerce, and its regulation belongs to Congress. Now, here was a purchase by the plaintiff, a citizen of South Carolina, of a ton of commercial fertilizer, from a citizen in Charleston, both of the same State. Thus far, this transaction belonged to internal or domestic commerce, and would be subject to State control, if any. But the plaintiff lived at Tatum, in Marlboro county, some distance from Charleston, and to reach him his fertilizer had to be transported by railroads to him; and, as it turns out, by railroads, some entirely in South Carolina, some in North Carolina, and others partly in both. Now, while it is admitted that our State railroad commission has jurisdiction over all railrads commencing and

terminating in the State, and over all transportation between the points within the State, yet it is equally true that it has no jurisdiction over transportation *running from the State into another State*, or from another State into this State, or running entirely in another State. Transportation like that suggested in the two first classes mentioned would be interstate commerce, while that in the last class would be the domestic commerce of the State in which it might be conducted. Applying these principles to the case in hand, it seems that only two of the railroads over which this ton of fertilizer was transported commence and terminate within the limits of the State—The Northwestern and the Cheraw & Darlington; and if the question here had originated out of the freight of these two roads only, one or both then there could have been no doubt as to the jurisdiction of the commission. But the Cheraw & Salisbury road is partly in this State and partly in North Carolina, and the Carolina Central road, from Wadesboro to Shoe Heel, is entirely in North Carolina, and then the Cape Fear and Yadkin Valley is partly in the two States. Our commission has no right to adjudicate questions of freight on roads like these three, for the simple reason that they are not South Carolina roads."

The *Milk Producers Protective Ass'n.* v. *Delaware, L. & W. R. Co.*, Vol. 7, Inter-state Commerce Reports, 158, contains an exhaustive opinion by the Inter-state Commerce Commission, bearing upon the matter under consideration by this Commission, as follows:

"The roads of the Elmira, Cortland & Northern Railroad Co. and the Delaware & Hudson Canal Co., wholly in New York, are employed in connection with the Lackawanna, under a 'common arrangement' for continuous carriage or shipment, in the transportation of milk and cream from points in New York to Hoboken, N. J., and the provisions of the Act to regulate commerce

apply to such transportation and the carriers engaged therein. The transportation of milk and cream by any of the defendants to Hoboken, Jersey City or Weehawken, which is performed wholly within the State of New Jersey, is not subject to regulation under that Act.

A further question of jurisdiction is raised by the Susquehanna as to 65 per cent of the milk transported by it from points in the State of New York. It claims that such portion of its milk from New York points, though carried through New Jersey, is delivered by it in New York City, and that transportation so conducted between points in the same State is not subject to the Federal statute. The decision of the United States Supreme Court in *Lehigh Valley R. Co.* v. *Pennsylvania,* 145 U. S., 194, 36 L. Ed., 673, 4 Inters. Com. Rep., 87, is relied upon by counsel for the Susquehanna as authority for a ruling that traffic shipped between points in the same State, but passing through another State in the course of transportation, is not within the provisions of the statute; and in their brief counsel call attention by citation to the fact that this commission regarded the Lehigh Valley case as such authority in *Chamber of Commerce of Minneapolis* v. *Chicago, M. & St. P. R. R. Co.,* 5 I. C. C. Rep., 571. We did not have occasion to decide the question in the Minneapolis case, and our reference there to the Supreme Court decision was that it *seemed* to have the effect of excluding commerce between points in the same State which passes through another State from regulation by the Federal government. The question is now distinctly raised as to the greater part of the milk traffic shipped over the Susquehanna from New York points, and we have carefully examined and considered the Lehigh Valley decision with a view of determining whether it is actually controlling as claimed by counsel. That case involved the right of the State of Pennsylvania to tax the receipts of the Lehigh Valley Company from traffic shipped between points in that State, but passing through New Jersey in course of

transportation, *so far as such receipts arose from service over the Lehigh Valley mileage within the State of Pennsylvania.* There was no dispute as to the amount of the tax, and the only question raised was whether the State could lay a tax upon the business at all. The Supreme Court upheld the validity of the tax involved. Whatever other or broader applications may be given to language used or principles considered by the Court in that case, *the decision was confined to the question of taxation on what was done or earned within the State.* The Lehigh Valley carried the property from a point in Pennsylvania to the New Jersey line and just across it to Phillipsburg, N. J., and from thence the continuous carriage was by arrangement conducted by the Pennsylvania Railroad Company to Philadelphia, Pa. If the State of Pennsylvania had attempted to regulate the aggregate charge or charges made for the entire transportation through different States, we think the Court would have had an entirely different case to consider. In this milk case, the Susquehanna, in carrying from Middleton, N. Y., to Jersey City, N. J., is admittedly engaged in inter-state transportation, and the carriage from Jersey City, N. J., to New York City, N. Y., across the Hudson River, whether performed by ferry or lighter, is also transportation between different states. Yet its contention is that by combining these two interstate transportations the service becomes intrastate, and the commerce internal to the State of New York. A state and an inter-state transportation may be combined and made continuous so as to *extend* the interstate service over the whole distance; but we are unable to understand how two distinctly inter-state carriages can, on being connected and made continuous, be *contracted* into purely State transportation because the beginning and ending points happen to be in the same State, so as to give that State jurisdiction of the whole transportation. The Lackawanna receives freight at New York City, takes it across the river to New Jersey,

and through that State and the State of Pennsylvania to Binghampton, N. Y., and out of the total distance of about 208 miles less than 15 are within the State of New York. Granting that New York may impose a tax on the gross receipts of the Lackawanna, represented by its mileage in New York, on traffic between points in that State, does it follow that New York can also regulate the freight charges and passenger fares of the Lackawanna for the whole distance between New York City and Binghampton, N. Y.? We think not. If neither of the States through which the transportation is conducted has power to regulate the entire transportation or the compensation exacted therefor, it does follow, we think, that such power is vested in the general government. This commission held, in 1888, in *New Orleans Cotton Exchange* v. *Cincinnati, N. O. & T. P. R. Co.*, 2 I. C. C. Rep., 375; 2 Inters. Com. Rep., 289, that:

'All commerce is subject to regulation; that wholly within a State and subject to its sovereign power by the State; that among the States and with foreign nations and not wholly within the sovereign power of any one State by the United States, for the reason that to be effectual, regulation must be uniform, at least not conflicting. Commerce between Shreveport and New Orleans, while crossing on the ferry between Delta, La., and Vicksburg, Miss., is not subject to regulation by the State of Louisiana. The business of transferring freight by the ferry between the two States is inter-state commerce. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; 29 L., ed. 158; 1 Inters. Com. Rep., 382.

'While passing through Mississippi, after passing from Louisiana, this commerce is inter-state, and subject alone to inter-state regulation. It is not subject at any place between Shreveport and New Orleans to regulation by both the State and the Congress. It passes by continuous carriage from Louisiana to, and through the State of Mississippi. It is not transportation 'wholly within one State.' It is subject to regulation by the pro-

vision of the Act to Regulate Commerce, and the commission has jurisdiction to revise the rates when the parties interested in them are before it.

The Lehigh Valley decision is not necessarily in conflict with this view. The Supreme Court called attention in that decision to the fact that the case was one of taxation, *and not one of direct regulation, citing Pacific Coast S. S. Co.* v. *Board of R. Commrs*, 9 Sawy., 253, as indicating the distinction. In the case so cited, the California Commission sought to regulate commerce between ports of that State when carried by a line of vessels navigating the Pacific Ocean more than a marine league from the shore, Mr. Justice Field, sitting as circuit justice and writing the opinion, said: 'To bring the transportation within the control of the State, as part of domestic commerce, *the subject transported must be within the entire voyage under the exclusive jurisdiction of the State.*' That decision seems to rest entirely upon the commerce clause in the Constitution of the United States. If the steamship or vessel plying between California ports was, while on the ocean, engaged in commerce with foreign nations, as was observed in the Lehigh Valley decision in discussing *Lord* v. *Goodall, N. & P. S. S. Co.*, 102 U. S., 541, 26 L. ed., 224, then a railroad company in carrying between points in the same State, by a route which passes through another State, is as clearly engaged in commerce among the States while operating in the second State. The effect in either case is to deny the jurisdiction of the State wherein the shipment commnces and terminates to regulate transportation over the entire distance when the route passes beyond its borders.

In *Covington & C. Bridge Co.* v. *Kentucky*, 154 U. S., 204, 38 L. ed., 962, 4 Inters Com. Rep., 649, decided since the Lehigh Valley case, the power of a State to tax, and its power to prescribe a scale of charges for the use of instrumentalities of inter-state commerce, are carefully distinguished. The Su-

preme Court held that the action of Kentucky in prescribing tolls to be charged over a bridge between Covington, Ky., and Cincinnati, O., was a regulation of interstate commerce. 'It is obvious that the bridge could not have been built without the consent of Ohio, since the north end of the bridge and its abutments rest upon Ohio soil; and without authority from that State to exercise the right of eminent domain, no land could have been acquired for that purpose. It follows that, if the State of Kentucky has the right to regulate the travel upon such bridge and fix the tolls, the State of Ohio has the same right, and so long as their action is harmonious there may be no room for friction between the States; but it would scarcely be consonant with good sense to say that separate regulations and separate tariffs may be adopted by each State (if the subject be one for State regulation), and made applicable to that portion of the bridge within its own territory.' After showing how, through a conflict of State interests, different tolls might be established by each State, the Supreme Court held that 'Congress, and Congress alone, possesses the requisite power to harmonize such differences, and to enact a uniform scale of charges which will be operative in both directions.' A practical transportation route exists from Covington, Kentucky, to Louisville, Kentucky, over the bridge to Cincinnati, through Ohio and Indiana to Jeffersonville, and across a bridge to Louisville. Kentucky cannot prescribe the tolls over either bridge, nor the transportation charges between Cincinnati, O., and Jeffersonville, Ind., nor can it authorize the construction of such a line or control its operation, and it follows that it could not regulate the aggregate charges over that route between Covington and Louisville. For the same reason, New York is without power to authorize the construction of a route like the Susquehanna from Middleton, N. Y., through New Jersey to New York City, or to control the operation of such a route, or to regulate charges made thereover between Middleton and New York City.

In *Texas & P. Ry. Co.* v. *Interstate Commerce Commission* (*The Import Rate Case*), 162 U. S., 197, 40 L. ed. 940, 5 Inters. Com. Rep., 405, the Supreme Court was called upon to determine what commerce was subject to the provisions of the Act to Regulate Commerce. The Court said: 'It would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce (*excepting commerce wholly within the State*), as well as that between the States and Territories, as that going to or coming from foreign countries.'

We hold in this case that the Susquehanna Company is as much subject to regulation under the Act to Regulate Commerce, in respect of the portion of its milk business from New York points which it carries through New Jersey and claims to deliver in New York City as it is in regard to other interstate transportation in which it is engaged."

7 Inters. Com. Rep., Vol. 7, pp. 158 to 162.

XIV.

Further Analysis of Lehigh Valley Case.

The Lehigh Valley case does not furnish a precedent for the case at bar. The Lehigh Valley case is one where the state of Pennsylvania *levied a tax* upon certain receipts of the Lehigh Valley Railroad Co., which receipts were a portion of the property of said company. The receipts were derived from transportation by continuous carriage from points in Pennsylvania to other points in the same state, but over lines partly in Pennsylvania and partly in New Jersey. The Court used the following language:

"The receipts named in class 2 are confined to that part of the transportation from Mauch Chunk to Phillips-

burg, *and the taxation to the mileage wholly within the State of Pennsylvania;* and the question is whether this taxation in respect of such receipts from freight and passengers carried by continuous transportation to Philadelphia from Mauch Chunck by way of Trenton, N. J., amounts to a regulation of interstate commerce."

The Court again said:

"The tax under consideration here was determined *in respect of receipts for the proportion of receipts within the State.*"

Several conditions entered into that case, which as heretofore shown, distinguishes it from a case where regulation of a rate is in question, or where the complaint is one of overcharge.

The Lehigh Valley Company was a Pennsylvania corporation. The Court used the following language:

"It should be remembered that the question does not arise as to the power of any other State than the State of the termini, *nor as to taxation upon the property of the company situated elsewhere than in Pennsylvania, nor as to the regulation by Pennsylvania* of the operations of this or any other company elsewhere."

Chief Justice Fuller in his opinion in the Lehigh case refers to the case of the *Pacific Coast Steamship Company* v. *Railroad Commissioners, supra*, and distinguishes the two cases as follows:

"In *Pacific Coast S. S. Co.* v. *Board of Railroad Commissioners*, 9 Sawy., 253; 18 Fed. Rep., 10, the Circuit Court for the District of California held, Mr. Justice Field delivering the opinion, that the California State Board of Railroad Commissioners had no power to

regulate or interfere with the transportation of persons or merchandise by a steamship company between ports within the State, if they were in transit to or from other states, or if the transportation consisted of voyages upon the ocean, bringing the steamships under the exclusive control of congress.

But that case involved the direct regulation by a state of transportation which had passed beyond the jurisdiction of the State, and did not decide the question of the power of a state to tax its own corporations in respect of transactions within it in the course of continuous carriage from one point to another in the State, in accomplishing which a part of another State was incidentally traversed."

In the commerce clause of the Federal Constitution by E. T. Prentice and J. G. Eagan, at pages 85, 87, 88 and 89, the following language is used:

"The Federal power over commerce extends not only to the goods which are transported, 'but also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged.'

Even carriers engaged in transportation from point to point in the same state are within Federal control so far as they are engaged in interstate commerce. * * A similar rule has been applied to transportation by land from point to point in the same state, passing through another State.

The conditions under which such transportation is conducted differ widely from the conditions which surround navigation; and yet it is apparent in one case, as in the other, that the transportation is not a matter which concerns alone the domestic affairs of a single State, but it is a part of that commerce extending beyond state lines which is within Federal jurisdiction.

It is probable, however, that the difference is on one side of the line only. In the case of commerce commencing in Pennsylvania and passing through New York, it is immaterial, in measuring the powers of the latter State, whether the commerce terminates in Pennsylvania or in Ohio. In measuring the powers of Pennsylvania, however, this fact is of great importance. If goods are transported from point to point in the state, all matters relating to their purchase and sale concern that state alone, and the Federal power is involved only to the extent of securing free transportation.

The cases which have arisen on this subject have involved validity of state regulation of freights, and of state taxation. In one of the cases the question concerned the validity of regulations of freight established by the railroad commission of Minnesota for transportation from Duluth to St. Paul, passing more than half the distance through the State of Wisconsin.

The expense of transportation depends largely upon rates of taxation, obligations and responsibilities imposed by law upon railway companies in different jurisdictions, and each state in its legislation must take into consideration these facts, and the physical geography of the country, the density of its population and amount of business. What is a proper charge for transportation in one State, may, therefore, not be reasonable in another.

In the case referred to it was held that Minnesota could not fix the rates in question. In *Sternberger* v. *Cape Fear & Y. V. R. R.* a similar question arose and was decided against the power claimed by the State. In that case goods had been shipped from one point to another in South Carolina and carried over five railroads, two of these roads being wholly within the State, one being wholly outside the state, and two being partly within and partly without. It is clear that the state had no jurisdiction over the road which was entirely without

her territory. The consequence was that, whatever might be its power over roads partly or wholly within its boundaries, it could not enforce orders which concerned a road in another State; and, so far as concerned the two roads which were partly within and partly without its limits, its jurisdiction was necessarily limited by the equal power of a sister State.

It is apparent, too, that the power of the State in such cases does not depend upon the number of carriers concerned. If the whole transportation were conducted by one corporation, which might or might not be in competition with two or more carriers making a joint rate, its duties and the powers of the State would be the same. It seems, therefore, that a State cannot regulate charges for such transportation."

Referring to the Lehigh Valley case, the author says:

"That case involved state taxation of the gross earnings of the railway company within the State. The receipts upon which the dispute arose were derived from transportation to Mauch Chunck, in Pennsylvania, through New Jersey to Philadelphia, and the tax being proportioned to the mileage within the State, would be sustained, even if levied upon receipts derived from transportation from one state to another. It is not certain, however, that regulation of interstate rates will always be sustained in cases where taxation of such rates will be. *The transportation is a unit, and the rate charged is a unit*—a single fare for a single service. A part of the rate which fairly represents travel within the State, may perhaps be taxed without reference to the part which is earned outside the State; but partial regulation is impossible. Furthermore, it should be noticed that, apart from the possible difference between taxation and regulation of rates, there is, since the passage of the Inter-

state Commerce Act, an express limitation upon the powers of the State to regulate rates which does not exist in the taxation of rates. *It seems, therefore, that the Lehigh Valley case does not support state regulation of interstate rates, and that, as concerns this subject, the rule which will probably be followed is that announced in the earlier case.*"

Speaking of the Lehigh Valley case, the Interstate Commerce Commission, as heretofore shown, in the case of the *Milk Producers Protective Assn.* v. *Delaware L. & W. R. Co.*, page 158 of Vol. 7, Interstate Commerce Rep., say:

"That case involved the right of the State of Pennsylvania to tax the *receipts* of the Lehigh Valley Company from traffic between points in that state, but passing through New Jersey in course of transportation, *so far as such receipts arose from service over the Lehigh Valley mileage within the State of Pennsylvania.* There was no dispute as to the amount of the tax, and the only question raised was whether the State could lay a tax upon the business at all. The Supreme Court upheld the validity of the tax involved. Whether other or broader application may be given to language used or principles considered by the court in that case, *the decision was confined to the question of taxation on what was done or earned within the State.* The Lehigh Valley carried the property from a point in Pennsylvania to the New Jersey line and just across it to Phillipsburg, N. J., and from thence the continuous carriage was by arrangement conducted by the Pennsylvania Railroad Company to Philadelphia, Pa. *If the State of Pennsylvania had attempted to regulate the aggregate charge or charges made by the entire transportation through different states, we think the court would have had an entirely different case to consider.*"

XV.

Difference Between Taxing Commerce and Taxing the Instrumentalities of Commerce.

While it is permissible for the states to tax property of a railroad, situated entirely within the State, even though the road be engaged in interstate commerce, still it does not permit the State to tax interstate commerce or in any way to regulate the rates for interstate commerce. This is clearly established by the following cases:

The *Henderson Bridge case* v. *City of Henderson*, U. S. Supreme Court Rep., Vol. 173, page 191, was a case in which the city of Henderson attempted to levy a tax upon the bridge, abutments and property of the Henderson Bridge Company. The Bridge Company contested the tax for several reasons, among others being that it was a regulation of the means of interstate commerce and therefore a regulation for interstate commerce itself; that the right to regulate commerce is vested solely in Congress, and that the levy of said tax was unconstitutional and void. The opinion written by Mr. Justice Harlan deals with the question in the following language:

"Nor does the fact that the bridge between low-water mark on either side of the river is used by the corporation controlling it for the purpose of interstate commerce exempt it from taxation by the state within whose limits it is permanently located. The State cannot by its laws impose direct burdens upon the conduct of inter-

state commerce carried on over the bridge. But, as the decisions of this court show, it may subject to taxation property permanently located within its territorial limits and employed in such commerce by individuals and by private corporations. In *Covington, &c. Bridge Co.* v. *Kentucky*, 154 U. S., 204, 212 (38: 962, 967, 4 Inters. Com. Rep., 649) it was said: 'As a mater of fact, the building of bridges over waters dividing two states is now usually done by congressional sanction. Under this power the State may also tax the instruments of interstate commerce as it taxes other similar property, provided such tax is not laid upon the commerce itself.' See also *Henderson Bridge Co.* v. *Henderson City*, 141 U. S., 679,689 (35: 900, 904); *Pittsburg C. C. & St. L. Railway Co.* v. *Board of Public Works*, 172 U. S., 32 (ante 354). In *Thomson* v. *Union Pacific Railroad Co.*, 9 Wall., 579 (19: 792), the question was as to the liabilities and rights of a railroad company in respect to taxation under state legislation. It was contended in that case that the road having been constructed under the direction and authority of congress for the purposes and uses of the United States, and being a part of a system of roads thus constructed, was exempt from taxation under state authority; that the road was an instrument of the general government and as such not subject to taxation by the State. That contention was overruled, this court saying: 'We are not aware of any case in which the real estate or other property of a corporation not organized under an Act of Congress, has been held to be exempt, in the absence of express legislation to that effect, from just contribution, in common with other property, to the general expenditure for the common benefit, because of the employment of the corporation in the service of the government.' *There is a clear distinction between the means employed by the government and the property of agents employed*

by the government. 'Taxation of the agency is taxation of the means; taxation of the property of the agent is not always or generally taxation of the means.' In the same case the court said that 'no one questions that the power to tax all property, business and persons within their respective limits is original in the states, and has never been surrendered,' although that power cannot be so used 'as to defeat or hinder the operations of the national government.' The same principles have been maintained in other cases in this court. If a state may tax the property of one of its corporations engaged in the service of the United States, such property being within its limits, there is no sound reason why the bridge property in question, although erected with the consent of congress over one of the navigable waters of the United States, should be withdrawn from the taxing power of the State which created the corporation owning it and within whose limits it is permanently located."

It is to be noticed that the Court refers to the Covington Bridge case, in which case it was held that the levy of toll was a regulation of interstate commerce. This illustrates the distinction between the Lehigh Valley case and the case at bar. The Lehigh Valley case, as well as the Henderson Bridge case, was one where the property itself was taxed and not the road; therefore it was not a regulation of commerce. In the Covington Bridge case a toll was levied both upon the Kentucky side and the Ohio side; these tolls, of course, were conflicting and there was a discrimination. The tolls themselves were rates. In the Henderson Bridge case this Court held that the levy of the tax upon a property is constitutional, and that a State may

tax the instruments of interstate commerce, *but cannot tax or regulate the commerce itself.* In the Lehigh Valley case, as likewise in the Henderson Bridge case, there was no regulation of the rates themselves, *but merely a tax upon the property of the company, which property in one case was the revenues or monies in the treasury of the company.* In the Henderson Bridge case the tax was upon the property itself, but in the Covington Bridge case, as in the case at bar, it was a toll of rate, and therefore a regulation of commerce itself.

To the same effect as the two cases cited hereunder see 76 U. S., 579, *Thompson* v. *U. P. R. R. Co.*

As illustrating further the difference between taxing commerce itself and taxing the instrumentalities of commerce, or the fruits of commerce, we refer to the case of *Philadelphia & Reading Railroad Company against Commonwealth of Pennsylvania*, commonly known as the case of the State Freight Tax, reported in volume 15 Wall., 232, in which the Court used the following language:

"Upon what, then, is the tax imposed by the Act of August 25th, 1864, to be considered as laid? Where does the substantial burden rest? Very plainly it was not intended to be, nor is it, in fact, a tax upon the franchise of the carrying companies, or upon their property, or upon their business measured by the number of tons of freight carried. On the contrary, it is expressly laid upon the freight carried. The companies are required to pay to the state treasurer for the use of the commonwealth 'on each two thousand pounds of freight so car-

ried,' a tax at the specified rates. And this tax is not proportioned to the business done in transportation. It is the same whether the freight be moved one mile or three hundred. If freight be put upon a road and carried at all, tax is to be paid upon it, the amount of the tax being determined by the character of the freight. And when it is observed that the Act provides, 'where the same freight shall be carried over and upon different but continuous lines, said freight shall be chargeable with tax as if it had been carried upon one line and the whole tax shall be paid by such one of said companies as the state treasurer may select and notify thereof,' no room is left for doubt. This provision demonstrates that the tax has no reference to the business of the companies. In the case of connected lines, thousands of tons may be carried over the line of one company without any liability of that company to pay the tax. The state treasurer is to decide which of several shall pay the whole. There is still another provision in the Act which shows that the burden of the tax was not intended to be imposed upon the companies designated by it, neither upon their franchises, their property, or their business. The provision is as follows: 'Corporations whose lines of improvements are used by others for the transportation of freight, and whose only earnings arise from tolls charged for such use, are authorized to add the tax hereby imposed to said tolls, and to collect the same therewith.' Evidently this contemplates a liability for the tax beyond that of the company required to pay it into the treasury, and it authorizes the burden to be laid upon the freight carried, in exemption of the corporation owning the roadway. It carries the tax over and beyond the carrier, to the thing carried. Improvement companies, not themselves authorized to act as carriers, but having only power to construct and maintain roadways, charging tolls for the use thereof, are generally limited by their

charters in the rates of toll they are allowed to charge. Hence, the right to increase the tolls to the extent of the tax was given to them, in order that the tax might come from the freight transported and not from the treasury of the companies. It required no such grant to companies which not only own their roadway, but have the right to transport thereon. Though the tolls they may exact are limited, their charges for carriage are not. They can, therefor, add the tax to the charge for transportation without further authority. *Boyle* v. *Reading R. R. Co.*, 54 Pa. St., 310; Cumb. Val. R. R. Co.'s Appeal, 62 Pa. St., 218. In view of these provisions of the statute, it is impossible to escape from the conviction that the burden of the tax rests upon the freight transported or upon the consignor or consignee of the freight (imposed because the freight is transported), and that the company authorized to collect the tax and required to pay it into the state treasury is, in effect, only a tax-gatherer. The practical operation of the law has been well illustrated by another when commenting upon a statute of the state of Delaware, very similar to the one now under consideration. He said: 'The position of the carrier under this law is substantially that of the one to whom public taxes are farmed out—one who undertakes by contract to advance to the government a required revenue, with power by suit or distress to collect a like amount out of those upon whom the tax is laid. The only imaginable difference is that in the case of taxes farmed out the obligation to account to the government is voluntarily assumed by contract and not imposed by law, as upon the carrier under this Act; also, that different means are provided for raising the tax out of those ultimately chargeable with it.' *Clarke* v. *Phil., Wil. & Balt. R. R. Co.*

Considering it, then, as manifest that the tax demanded by the Act is imposed, not upon the company, but

upon the freight carried, and because carried, we proceed to inquire whether, so far as it effects commodities transported through the State, or from points without the State to points within it, or from points within the State to points without it, the Act is a regulation of interstate commerce. Beyond all question, the transportation of freight or of the subjects of commerce for the purpose of exchange or sale is a constitutent of commerce itself. This has never been doubted, and probably the transportation of articles of trade from one state to another was the prominent idea in the minds of the framers of the constitution, when to congress was committed the power to regulate commerce among the several states. A power to prevent embarrassing restrictions by any state was the thing desired. The power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations. It would be absurd to suppose that the transmission of the subjects of trade from the state to the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade either with foreign nations or among the states. In his work on the constitution, Sec. 1057, Judge Story asserts that the sense in which the word 'commerce' is used in that instrument includes not only traffic but intercourse and navigation. And in the passenger cases, 7 How., 416, it was said: 'Commerce consists in selling the superfluity, in purchasing articles of necessity, as well productions as manufactures, in buying from one nation and selling to another, or in transporting the merchandise from the seller to the buyer to gain the freight.' Nor does it make any difference whether this interchange of commodities is by land or by water. In either case the bringing of the goods from the seller to the buyer is commerce. *Among the states it must have been principally by land when the constitution was adopted.*

Then, why is it not a tax upon freight transported from State to State a regulation of interstate transportation and, therefore, a regulation of commerce among the States? Is it not prescribing a rule for the transporter, by which he is to be controlled in bringing the subjects of commerce into the State, and in taking them out? * * *

That this argument rests upon a misconception of the statute is, to our minds, very evident. We concede the right and power of the State to tax the franchises of its corporations, and the right of the owners of artificial highways, whether such owners be the State or grantees of franchises from the State, to exact what they please for the use of their ways. That right is an attribute of ownership. But this tax is not laid upon the franchises of the corporation, nor upon those who hold a part of the State's eminent domain. It is laid upon those who deal with the owners of highways or means of conveyance. The State is not herself the owner of the roadways, nor of the motive power. The tax is not compensation for services rendered by her or by her agents. It is something beyond the cost of transportation or the ordinary charges therefor. Having no ownership in the railroads or canals the State has no title to their income, except so far as she reserved it in the charters of the companies. Tolls and freights are a compensation for services rendered, or facilities furnished to a passenger or transporter. These are not rendered or furnished by the State. A tax is a demand of sovereignty; a toll is a demand of proprietorship. The tax levied by this Act is, therefore, not a toll. It is not exacted in compensation for the use of the roadway, and if it were, the right to make terms for the use of the roadway is in the grantee of the franchise, not in the grantor. But, in truth, the State has no more right to demand a portion of the tolls which the grantees of her franchises may exact, than she

would have to demand a portion of the rents of land which she had sold. She may tax by virtue of her sovereignty, and measure the tax by income, but the income itself is beyoud her reach."

XVI.

A State Railroad Commission Cannot fix a Rate of Carriage Between Points Within the same State where the Route Extends Across the Boundary of a Neighboring State.

Such power is exclusively in Congress. This appears from the authorities already cited. But we would, however, refer with special emphasis to the case of *State ex rel. Rld. & W. C. against Chicago, St. P., M. & N. Ry. Co.*, reported in 41 N. W., beginning on page 1047, and from which we have heretofore quoted.

Also to the case of the *New Orleans Cotton Exchange* v. *C. N. O. & T. P. R. Co.*, reported in volume 2 Interstate Commerce Reports, at page 289.

See also other cases cited herein.

XVII.

Necessity of Federal Control over Interstate Commerce.

Mr. Justice Field, in the case of *Gloucester Fruit Co.* v. *Commonwealth of Pa.*, 114 U. S., 159, states very clearly the reason why it was deemed best, by the framers of the Constitution, to invest Congress with the exclusive power over

commerce between the states, and with foreign nations. The reason he gave for this granted power is expressed by him as follows:

"And it needs no argument to show that the commerce with foreign nations and between the states, which consists in transportation of persons and property between them is a subject of national character and requires *uniformity of regulation.* Congress alone, therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by state legislation. Otherwise there would be no protection against *conflicting regulations of different states,* each legislating in favor of its own citizens and products and against those of other states. It was from apprehension of such conflicting discriminating state legislation, and to secure uniformity of regulation, that the power to regulate commerce, with foreign nations and among the states, was vested in congress."

Therefore, in determining the questions arising under the bill in this case, the first proposition to be considered is whether the facts set out in the bill indicate that in the shipment of freight from Fort Smith, Arkansas, into and through the Indian Territory, to another point in Arkansas, there would arise a conflict between the State of Arkansas and the Indian Territory, or to State it otherwise, would the Indian Territory, as a separate State, be affected in its rights by the shipment of this freight, or could it in turn, by the exercise of its power, affect the railroad over which the shipment was made by any regulations that it, as a separate state, might see fit to pass. If a conflict of this kind could arise with reference to such ship-

ments then the commerce must be of that kind which is exclusively under the jurisdiction of the Congress of the United States.

It must be conceded that the railroads have a right to charge such rate for the shipment of freight as will secure to them a reasonable profit over and above the expense of operating the road, and the payment of taxes and the interest on its indebtedness. It must also be conceded that the Indian Territory, or Congress for it, has the right to regulate the running of all trains through that Territory, from the moment they reach its borders on the one side until they leave it on the other. The bill shows that that part of the Territory through which the road passes is a populous country, that there are many stations along the line, and that the road has junctions and connections with other roads. The Congress of the United States has the power to regulate within the Indian Territory the speed of trains, to provide how they shall be run, for instance, as to whether or not the trains shall be run with double-headers, what equipments they shall have, to provide what rate of taxation the road shall pay, to provide upon what terms it shall interchange freight with other connecting carriers, to provide whether the separate coach law shall be in effect within that Territory, and in many other ways, by its power to regulate and to tax, it has the power to affect greatly the cost of transportation through that Territory. The framers of the Constitution realized fully the necessity of

providing some tribunal that would not be actuated by selfish motives in regulating commerce of this kind. They realized fully that the tendency of each State would be to pass such legislation as would be most beneficial to its citizens, or at least that would meet the selfish views of the citizens of that State. They foresaw that this would necessarily place the interest of the citizens of one state in conflict with the interest of the citizens of another, and that their legislatures would be unable to harmonize these interests. Therefore, they wisely provided that Congress should be vested with this superior power. For the sake of emphasizing, we repeat here again the language of Justice Field, in the case of *Gloucester Fruit Co.* v. *Commonwealth of Pa., supra:*

"Otherwise there would be no protection against conflicting regulations of different States, each legislating in favor of its own citizens and products and against those of other States."

The powers existing between Arkansas and the Indian Territory with reference to the shipment of freight in this case brings the case completely within the letter and the principle laid down by Mr. Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat., 69. In that case the court used the following language:

"The subject to which the power is next applied is to commence among the several States. The word 'among' means intermingled with. A thing which is among others is intermingled with them. Commerce among the States cannot stop at the external boundary

line of each State but may be introduced into the interior. It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and *which does not extend to or affect other States.*"

Treating the Indian Territory as a State with the power of legislation, for it has that power through Congress, we submit the following propositions: The appellee's predecessor had no power to build its road through the Indian Territory, except by the consent of that Territory, nor has appellee any power to operate the road through there except by the consent of the Territory. It can operate it only in such manner as the Territory shall dictate. There can be no doubt whatever but that the Territory is affected, and seriously affected, by the operation of every train that passes through it. *The test laid down by Chief Justice Marshall is, as to whether more than one state would be affected by the transportation; if so, it is interstate commerce. If only one state is affected it would be intra-state commerce.*

To show that the states have power and control only over such shipments as are wholly and completely within its territory, we again appeal to the case of *Gibbons* v. *Ogden, supra.* The language there used is:

"That commerce which is completely internal; which is carried on between man and man in a state or between different parts of the same state, and which *does not extend to or affect other states.*"

Again, Chief Justice Marshall, in the same case says:

"The genius and character of the whole government seems to be that its action is to be applied to all the external concerns of the nation, and to those external concerns which affect the states generally, but not to those which are completely within a state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government."

Congress evidently understood that the only power left to a state was to control such commerce as was wholly and completely within its borders, for in section one of the act known as the Interstate Commerce Act, approved Feb. 4th, 1887, in a proviso it stated:

"That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, *wholly within one state*."

There can be no question but that it is intended to exclude any semblance of authority or power the state might seek to exercise over freight after it had passed beyond its borders.

We see no reason why the navigation cases referred to by us in support of our contention in this case, are not fully applicable to it.

It was contended in the trial court by counsel for appellants that those cases involved the question of navigating the high seas. That is true, but when we come to the reason for vesting in Congress the power over commerce with for-

eign nations, *it is the same reason that caused the power to be vested in Congress to regulate intercourse between the several states.* The interests of the different states being so conflicting would absolutely preclude them from agreeing upon any mode or method of regulating the controversies arising out of the traversing of ships of this country over the high seas, consequently the power to do so was granted to congress. The conflicting interests of the states would utterly forbid their being able to agree upon the regulation of commerce between the different states. Therefore, that power was vested in Congress. The reason is the same, and it is no stronger in the one case than in the other. If there is any difference it is only in degree. Therefore, the navigation cases are absolutely in point in this case. In the navigation cases the moment the vessel crosses the line of a marine league from shore they enter into a jurisdiction over which the State had no control or power. Their passage over the high seas must be regulated by some other power and with reference to the rights of other nations; therefore, Congress was clothed with the power to represent the several states in that matter. The very moment freight leaves the borders of the state in which the transportation originated and enters another State, the State which it has left loses all control of it. During its passage through another state the train that carries it is subject to another jurisdiction. The conflicting interest arises

the moment the dividing or state line is crossed. *Neither state can control it in its entire passage; therefore, a higher power must be called upon. That power is Congress.* There is an exact similarity between the power of Congress over navigation of the high seas and that of its power over transportation by land, that affects more States than one, and the reason grows out of conflicting jurisdiction.

Upon argument of this case in the trial court the question was asked as to whether or not Congress would have the right to regulate freight that started from the State of Illinois, for instance, and ran through Canada and from Canada into the State of New York. Our answer is that Congress would have no power over the transportation of that freight through Canada except such as was acquired by treaty with Canada, but it would have control over the freight that passed from one State to another, so far as the States were concerned, whether it went through Canada or not. It is clear that if freight left a station at some point in Montana, ran part of the way through Canada and back into Montana, the Dominion of Canada would be so affected by it that it would be held to be foreign commerce and no power in this country other than the Congress of the United States, through its treaty making power, could control it, as far as this country is concerned.

XVIII.

Power of State to Tax Receipts Derived From Interstate Commerce.

During the argument in the trial Court there was much discussion of and many questions asked concerning the power of the States to tax freight receipts derived from commerce of which a portion of the transportation was performed in a State other than that imposing the tax. It may be that these questions will be repeated.

We feel, therefore, that upon this matter we cannot do better than to submit the admirable review of the cases bearing thereon as written by Messrs. Prentice & Eagan. It will be found on pages 260 to 268 of their work above referred to, the Commerce Clause of the Federal Constitution. Their language is as follows:

TAXATION OF RECEIPTS.

"A State may tax receipts derived from business carried on entirely within its limits, but it may not tax receipts derived from business outside its jurisdiction, where the person or corporation conducting the business is not domiciled in the taxing State and the receipts have not been introduced within its limits so as to become part of its property.

There has been, however, great diversity of views as to the power of the State to tax receipts derived from transportation across State lines.

In the first case on the subject, *State Tax on Gross Receipts*, the court distinguished between a tax upon goods on account of their carriage, and a tax upon the fruits of carriage when reduced to possession and min-

gled with the other property of the carrier. The tax was laid upon receipts of corporations organized under the laws of Pennsylvania, and was collectible once in six months. The court held that this tax fell upon a fund which had become incorporated with the general mass of property in the State, and that it was valid, as would have been a tax upon imported goods after the package had been broken. The States, it was said, may tax the property, real or personal; of all their corporations, including carrying companies, as they tax similar property belonging to natural persons, and to the same extent. This taxation may be laid upon a valuation or may be an excise, and in exacting an excise tax from their corporations the States are not obliged to impose a fixed sum upon franchises or their value, but may demand a graduated contribution, proportioned either to the value of the privileges granted, to the extent or to the result of their exercise. No mode of affecting this, and no forms of expression which have not a meaning beyond this, can be regarded as violating the Constitution. The tax in question, it was said, was manifestly imposed upon the railroad companies measured in amount by the extent of the business or the degree to which their franchises were exercised. The statute did not look beyond the corporation to those who may have contributed to its treasury. The tax was not levied until after the money received for freights and from other sources of income was actually in possession of the company, and has lost its distinctive character as freight. Such a tax as this, it was held, fell within the power of the States.

In view of the decision in the case of the *State Freight Tax* which had just been made, 'it is not too much to say that the Gross Receipts decision was received with surprise. It was at once felt that the distinction thus drawn between freight and the money paid for carrying freight was unsound in principle, and that

the decision must soon be overruled. Even at the first, its force was much weakened by the strong dissent of three judges.'

In the dissenting opinion it was said that there was practically no difference between a tax upon transportation and one upon its proceeds. To hold that the tax on freight is within the evil to be remedied by the commerce clause, and that a tax on receipts therefrom is not, is 'to keep the word of promise to the ear and break it to the hope.'

It was conceded that transportation companies may be taxed in any way that does not necessarily impose a burden upon interstate transportation; but it was said that these companies differ from banking, insurance or manufacturing companies in that, while the latter concerns are only remotely or incidentally connected with commerce the business of transportation is itself commerce.

In concluding the dissenting opinion Mr. Justice Miller said:

'I lay down the broad proposition that by no device or evasion, by no form of statutory words, can a State compel citizens of other States to pay it a tax, contribution or toll, for the privilege of having their goods transported through that State by the ordinary channels of commerce. And that this was the purpose of the framers of our Constitution I have no doubt; and I have just as little doubt that the full recognition of this principle is essential to the harmonious future of this country now as it was then. The internal commerce of that day was of small importance, and the foreign was considered as of great consequence. But both were placed beyond the power of the States to control. The interstate commerce to-day far exceeds in value that which is foreign, and it is of immense importance that it should

not be shackled by restrictions imposed by any State in order to place on others the burden of supporting its own government, as was done in the days of the helpless Confederation.

I think the tax on gross receipts is a violation of the Federal Constitution, and therefore void.'

A large number of decisions are to be found announcing the doctrine approved by the majority of the Court in this case and supporting State taxation of gross receipts.

In *Erie Railway* v. *Pennsylvania*, a State law was sustained which imposed a tax on gross receipts of railroad companies doing business in the State, in the proportion of their mileage within and without the State. In this case the tax was levied upon receipts of a consolidated corporation existing under the laws of Pennsylvania, Maryland and Delaware. There was no discussion of the constitutional question, but the case of *State Tax on Railway Gross Receipts* was followed. A similar decis was made in *Minot* v. *Railroad Co.*, where a tax upon net receipts was sustained when levied in proportion to the mileage within and without the State. Many other cases sustained taxation upon receipts of railroad, express, telegraph and other companies engaged in commerce among the States, and upon receipts from sales of imported goods; and this rule seems to have been approved by the Supreme Court as late as 1884, in the case of *Moran* v. *New Orleans*. In 1887 the rule which had so long prevailed was changed, and the case of the *State Tax on Railway Gross Receipts* was considered and questioned. The case announcing the new rule is that of *Steamship Co.* v. *Pennsylvania*. That case involved the validity of a tax levied by Pennsylvania upon gross receipts of a steamship company, incorporated under its laws, derived from transportation of persons and prop-

erty by sea between different States and to and from foreign countries. In holding this tax invalid, the court said that the question was whether the tax upon the receipts amounted to a regulation of, or an interference with, interstate and foreign commerce. It was levied directly upon the receipts derived by the company from its freight and fares for the transportation of persons and goods between different States and countries. 'This transportation was an act of interstate and foreign commerce. It was the carrying on of such commerce. It was that, and nothing else. In view of the decisions of this Court, it cannot be pretended that the State could constitutionally regulate or interfere with that commerce itself. But taxing is one of the forms of regulation. It is one of the principal forms. Taxing the transportation, either by its tonnage or its distance, or by the number of trips performed, or in any other way, would certainly be a regulation of the commerce, a restriction upon it, a burden upon it. Clearly this could not be done by the State, without the interference with the power of congress.'

Accepting, therefore, the fact as established, that the State could not tax the transportation, could the freights and fares received for transportation be constitutionally taxed? Looking at the substance of things, it was difficult to see any difference between such taxes. The one was tantamount to the other, and it was nearer to metaphisics than plain logic for the State officials to say to the company: 'We will not tax you for the transportation you perform, but we will tax you for what you are getting for performing it.' Such a position can hardly be said to be based on sound reason.

It was not, the Court said, within the scope of the discussion to refer to the disastrous effects to which the power to tax interstate or foreign commerce might lead. If the power exist in the States at all, it has no limit but

their discretion, and might be so exercised as to destroy that commerce, or to load it with a burden, seriously affecting the business and prosperity of other States interested in it; and if those States, by way of retaliation or otherwise, should impose like restrictions, the utmost confusion would prevail in our commercial affairs.

The result of this case, then, was to deprive the States of power to tax receipts derived from interstate commerce.

Following this decision it was held in Indiana that a tax levied upon the gross receipts of a car company in the proportion which the mileage of the company within the State bore to that without was unconstitutional. In Vermont it was also held that receipts from transportation could not be thus taxed.

The power of the Federal government over interstate commerce, the Court said, was exclusive and supreme. The question involved was a Federal one; and while the earlier decisions of the Supreme Court were not harmonious, the later cases had carried the Federal power to the utmost length, and have much restricted, if, indeed, they have not completely annulled, the police power of the States where interstate questions are involved, and they have, in effect, swept away all State lines.'

A similar decision was rendered by the United States Circuit Court in the case of *Indiana* v. *Pullman's Car Co.*, where it was held the fact that a sum of money was earned in Indiana gives that State no right to tax it in the treasury of the company in Illinois. The statute in question, it was said, was void as an effort to give State law extra territorial force and to regulate commerce among the States.

The rule prohibiting taxation of receipts has been applied in a large number of cases and is now 'thoroughly established.'

In *Maine* v. *Grand Trunk Ry. Co.*, we reach the third stage of constitutional doctrine upon this subject, and the rule of apportionment which had been applied to the property of telegraph and car companies is applied to the taxation of gross receipts. The statute in question in this case provided that every person operating a railroad within the State should pay to the State Treasurer an annual excise tax for the privilege of exercising its franchise in the State, the amount of the tax to be ascertained by reference to the gross receipts of the company in the proportion of its mileage within and without the State. The statute was upheld on the ground that it was levied upon the railroad company, a foreign corporation, for the privilege of exercising its franchises within the State. It was permissible, the Court said, to measure this tax by reference to the receipts of the company, and nothing in this decision, it was said, conflicted with the decision in *Steamship Co.* v. *Pennsylvania*. It seems queer that the burden of the tax in question fell upon the gross receipts by which the tax was measured. The validity of a tax cannot depend upon the name which is given to it, nor can it be assumed that the ruling of the Court in *Steamship Co.* v. *Pennsylvania* would have been different had the wording of the law there involved been that which the State of Maine subsequently adopted.

In the dissenting opinion it was said that by the decision in that case it was held that taxation may be imposed upon receipts of the company for the exercise of its franchises within the State if graduated according to the mileage. This tax might be levied as upon property. The receipts might also be taxed as upon the franchise. In many other ways the burden might be laid upon them.

'If the interstate commerce of the country is not, or will not be handicapped by this course of decision,' said Mr. Justice Bradley, 'I do not understand the ordinary principles which govern human conduct.'

The decision in the *Maine Receipts Case* must be regarded as a variation from the rule stated in the *Steamship Co.* v. *Pennsylvania*. It is no longer true that receipts cannot be taxed, and that so far as this question is concerned the States do not exist. Receipts can be taxed if the rule of apportionment be followed. Since the decision in the Maine Case, receipts have been referred to, not only as a measure of value of franchises and of real and personal property, but even in addition to all these taxes they have been made subject to a payment for benefits derived from control by a State commission."

Commerce Clause of the Federal Constitution by Prentice & Eagan, pp. 260 to 268.

XIX.

During the argument in the trial Court the inquiry was made as to whether the so-called Granger cases were not authority for the doctrine that a charge for continuous transportation over several States might be divided in several parts, each of which would fall under State control.

We submit that the cases establish no such doctrine.

A clear analysis of the Granger cases, and a correct exposition of the doctrine thereof will be found in the opinion of Judge Hammond in the case of the *Louisville & N. R. Co.* v. *The Railroad Commission of Tennessee*, 19 Fed. Rep., 698, *et seq.*

The Granger cases, however, so far as such doctrine is concerned, are disposed of by this

Court in the case of the *Wabash, St. L. & Pacific R. R. Co.* v. *Illinois*, reported in 118 U. S., page 557. In the opinion, Mr. Justice Miller, while speaking of those cases, used the following language:

"Of the members of the court who concurred in those opinions, there being two dissentients, but three remain, and the writer of this opinion is one of the three. He is prepared to take his share of the responsibility for the language used in those opinions including the extracts above presented. He does not feel called upon to say whether those extracts justify the decision of the Illinois Court in the present case. It will be seen from the opinions themselves, and from the arguments of counsel presented in the reports, that the question did not receive any very elaborate consideration, either in the opinions of the court or in the arguments of counsel. And the question how far a charge made for a continuous transportation over several States, which included a State whose laws were in question, may be divided into separate charges for each State, in enforcing the power of the State to regulate the fares of its railroads, was evidently not fully considered. These three cases, with others concerning the same subject, were argued at the same time by able counsel, and in relation to the different laws affecting the subject of the States of Illinois, Iowa, Wisconsin, and Minnesota; the main question in all the cases being the right of the State to establish any limitation upon the power of the railroad companies to fix the price at which they would carry passengers and freight. It was strenuously denied, and very confidently, by all the railroad companies, that any legislative body whatever had a right to limit the tolls and charges to be made by the carrying companies for transportation. And the great question to be decided, and which was decided,

and which was argued in all those cases was the right of the State, within which a railroad company did business, to regulate or limit the amount of any of these traffic charges."

Since writing the foregoing, we have received a copy of the brief of counsel for appellants. We do not deem it necessary to do more with reference thereto than to refer to a few of their citations not hereinbefore reviewed, as follows:

The case of *Ratterman* v. *Western Union Telegraph Company* was one relating to a tax upon receipts of a telegraph company, which receipts were derived partly from interstate and partly from State commerce, and the return and assessment were in gross. The Court held that the assessment was not wholly invalid, but was invalid only in proportion to the extent such receipts were derived from interstate commerce, and that the collection by the State of the taxes of that portion of the receipts derived from interstate commerce should be enjoined.

The case of Western Union Telegraph Company was one relating to a tax on messages. The Court held that the telegraph company, having accepted the restrictions and obligations provided by Congress, occupied in Texas the position of an instrument of interstate commerce and of a government agent for the transmission of messages on public business, and that the power to tax its occupation could not be exercised by placing a specific tax on each message sent out of the State or sent by public

officers on business of the United States, but that a tax by the State on messages sent by private parties from one place to another, exclusively within its own jurisdiction, would not be repugnant to the Constitution of the United States. In the opinion the Court used the following language, viz: "The rule that the regulation of commerce which is *confined exclusively within* the jurisdiction and territory of a State, *and does not affect other Nations or States, or the Indian tribes*, that is to say, *the purely internal* commerce of a State, belongs exclusively to the State, is as well settled as that the regulation of commerce *which does affect other Nations or States or the Indian Tribes belongs to Congress.*

We have reviewed and see nothing applying in any way to the case at bar in the following cases cited by appellant, viz:

Ex parte Boyer; Pensacola Telegraph Company v. *Western Union Telegraph Co.; Scammon* v. *K. C., St. J. & C. B. Ry. Co.;* and *Coe* v. *Errol.*

We shall not waste any time in dealing with the sections cited from Elliott on Railroads. We do not believe that the properly adjudicated cases bear out his statements or warrant the distinctions he draws.

The other citations by counsel for defendant in error, viz: *Dillon* v. *Erie Railroad Company, United States ex rel. Kellogg* v. *Lehigh Valley R. R. Co.*, and Volume 7 Add. XXXVII,

Interstate Commerce Reports, all depend for authority upon the former Lehigh Valley case, reviewed elsewhere herein.

It seems to us that upon the basis of history; upon the basis of adjudicated cases, and upon the basis of reason, we have shown that the Arkansas Railroad Commission has not the power to regulate the rates in question, and that in attempting to do so they were exercising an unwarranted and unlawful power, and one which the State could not confer upon them.

We respectfully submit that the decree of the Circuit Court ought to be affirmed.

GARDINER LATHROP,
THOMAS R. MORROW,
JAMES B. READ,
Solicitors for Appellee,
The Kansas City Southern Railway Company.

MAX PAM,
Of Counsel.